Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THOMAS PAGE, Warden,

Petitioner,

v.

JERRY MAHAFFEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

I. What is the standard of review an appellate court should apply when reviewing a trial court's finding that the opponent of peremptory challenges has not established a *prima facie* case under *Batson v. Kentucky*, 476 U.S. 79 (1986)?

II. Whether, by itself, the number of peremptory challenges used against members of a particular race or sex is sufficient to establish a *prima facie* case?

III. Whether an appellate court may, if the record is sufficient, conduct the step-two and step-three inquiries under *Batson* if it determines that the trial court improperly failed to find that a *prima facie* showing was met?

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OPINIONS BELOW

Petitioner respectfully petitions for a writ of certiorari to review the November 19, 1998 decision of the United States Court of Appeals for the Seventh Circuit, published at 162 F.3d 481 (7th Cir. 1998), and reprinted in the appendix to this petition. (App. A). The judgment reversed the denial of a petition for writ of habeas corpus challenging Respondent's convictions for the murders of Dean and Jo Ellen Pueschel and the attempted murder and aggravated battery of their eleven-year-old son, Richard, as well as his convictions for home invasion, rape, armed robbery, residential burglary and theft, and the death sentence imposed for the murder convictions. Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc was denied on January 15, 1999 with the Honorable Joel M. Flaum, one of the judges on the original panel, voting to grant rehearing. (App. B).

The original panel decision of the Seventh Circuit, which affirmed the District Court with one dissent, issued on August 6, 1998, is published at 151 F.3d 671 (7th Cir. 1998), and is reprinted in the appendix to this petition. (App. C). All of the members of the original panel voted to grant the Respondent's Petition for Rehearing in an order issued on October 26, 1998 and published at 160 F.3d 1139 (7th Cir. 1998). (App. D).

The memorandum opinion and order of the District Court denying the petition for writ of habeas corpus, published at 978 F.Supp. 762 (N.D. Ill. 1997), and reprinted in the appendix to this petition, issued on September 4, 1997 and was docketed on September 5, 1997. (App. E). The District Court's denial of Respondent's timely Motion to Alter or Amend the Judgment issued on November 14, 1997 and was docketed on November 18, 1997. (App. F). On December 18, 1997, the District Court issued a certificate of probable cause or, in the alternative, of appealability. (App. G).

The decision of the Illinois Supreme Court affirming Respondent's convictions and death sentence, filed on April 20, 1989, is published at 128 Ill. 2d 388, 539 N.E.2d 1172, 132 Ill. Dec. 366 (1989), and is also reprinted in the appendix to this petition. (App. H).

JURISDICTION

The Court of Appeals for the Seventh Circuit issued its opinion on rehearing on November 19, 1998. The Seventh Circuit issued a stay of its mandate until April 19, 1999. The Petition for Rehearing with Suggestion for Rehearing En Banc was denied on January 15, 1999. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. State Court Proceedings

On August 29, 1983, in the early morning hours, Dean and Jo Ellen Peuschel were murdered in their Chicago home. Their eleven-year-old son, Richard, who was stabbed with a knife and clubbed with a baseball bat, was left for dead but survived the attack. (App. C3). Dean Peuschel was stabbed numerous times and clubbed over the head with his son's baseball bat. (App. C3). Jo Ellen was raped, sodomized, and beaten in the head with the

butt of a pistol, which caused her death. (App. C3). Richard saw his mother crying as she was being struck, and then either passed out or was himself struck. (R. 2387, 2390, 2451).[1] In court, Richard identified Respondent Jerry Mahaffey and his brother, Reginald, as the two men who attacked him and murdered his parents. (R. 2394).

Respondent, in a written confession, admitted trying to suffocate, strangle and choke Richard Peuschel. He admitted that he clubbed the boy with his own little league baseball bat (R. 2947-48), and that he and his brother, with another baseball bat, simultaneously clubbed Dean Peuschel over the head. (R. 2949). He further admitted that he watched his brother rape Jo Ellen and beat her with a pistol as she was lying on the floor next to her son. (R. 2950).

Respondent and his brother took numerous items of personal property from the Peuschel home. Many of the items were recovered from the bedroom closet of Respondent's apartment and were identified, in court, by family members as belonging to either Dean, Jo Ellen or Richard Peuschel. (R. 2230, 2380, 2382-83) A gun belonging to Dean Peuschel was recovered from Reginald Mahaffey, and blood on the gun was subsequently determined to be the same type as Jo Ellen Peuschel's. (R. 2818).

Respondent was tried jointly with his brother and found guilty by a jury of the murders of Dean and Jo Ellen Peuschel, the attempted murder and aggravated battery of Richard, home invasion, rape, armed robbery, residential burglary and theft. The jury found Respondent eligible for the death penalty and found no mitigating factors sufficient to preclude imposition of death. (R. 4309-11).

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[1] "R." refers to the record from Respondent's state court trial which was filed in the Seventh Circuit.

On April 30, 1986, while Respondent's appeal was pending in the Illinois Supreme Court on direct review, this Court issued its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). In light of *Batson* and *Griffith v. Kentucky*, 479 U.S. 314 (1987), the Illinois Supreme Court, on October 26, 1987, issued a supervisory order in Respondent's case directing the trial court to conduct an expedited hearing to permit Respondent to present evidence to substantiate his claim of unconstitutional discrimination in the exercise of peremptory challenges. (App. H4). The supervisory order also provided that if the trial court found that a *prima facie* showing of discrimination was made, it should then determine whether or not there was a race-neutral explanation by the State for the exercise of the questioned challenges. (App. H4). The trial court conducted the hearing on November 30, 1987, and found that Respondent had failed to establish a *prima facie* case of discrimination. (App. H4).

On the return of Respondent's case to the Illinois Supreme Court, he raised several issues including whether the trial court erred in finding that he failed to establish a *prima facie* case of discrimination under *Batson*. The facts which the state high court found relevant to the resolution of Respondent's *Batson* claim appear in its opinion at 128 Ill. 2d at 406-09, 539 N.E.2d at 1180-82. (App. H6-20).

In analyzing Respondent's *Batson* claim, the Illinois Supreme Court found that he had met the first element of the test for establishing a *prima facie* case—he is black and the State exercised peremptory challenges to remove from the venire certain members of his race. (App. H25). Therefore, the only question remaining was "whether, considering 'all relevant circumstances,' he ha[d] established a *prima facie* case of discrimination." (App. H25).

The state high court noted that the "relevant circumstances" a trial court may consider when determining

whether a *prima facie* case of discrimination has been established include: a pattern of strikes against black veniremen; the prosecutor's questions and statements during *voir dire* and in exercising challenges; the disproportionate use of peremptory challenges against blacks; whether the excluded blacks were a heterogeneous group sharing race as their only common characteristic; the level of black representation in the venire as compared to the jury; the race of the defendant and the victim; and the race of the witnesses. (App. H25-26). The court cautioned, however, that the trial court "'must avoid arbitrarily deciding this delicate question solely from the number of blacks peremptorily challenged.'" (App. H26).

The Illinois court noted that at the *Batson* hearing, the State gave criteria, apparent from the record, for challenging the African-American veniremen, asserting that the criteria applied to all veniremen regardless of race. (App. H19). In response to Respondent's argument that the trial court's reliance on "'apparent explanations'" for the State's challenges demonstrates that the trial judge "'confused the [Respondent's] duty to present a *prima facie* case *** and the prosecutor's duty to explain the challenges once a *prima facie* case is established,'" the state high court determined that "rather than relying on the 'apparent explanations' for the State's challenges, the trial court merely reviewed the characteristics of the stricken jurors to determine their heterogeneity to the jurors who ultimately sat. The state high court concluded that this is a relevant circumstance which a trial court may consider when determining a *prima facie* case of discrimination." (App. H27).

Finally, the state supreme court addressed Respondent's claim that the trial court had improperly considered his previous experience with one of the Assistant State's Attorneys. The high court concluded that "the record shows that the trial judge used his experience, as well as his

superior knowledge of local conditions and prosecutors, in determining that the State's peremptory challenges were not motivated by impermissible racial-group bias." (App. H28). The court saw no reason to disturb this finding.

Concluding that the trial judge's finding that Respondent failed to establish a *prima facie* case of discrimination was not against the manifest weight of the evidence and rejecting the remainder of Respondent's claims, the Illinois Supreme Court affirmed Respondent's convictions and death sentence. This Court denied a petition for writ of certiorari in *Mahaffey v. Illinois*, 497 U.S. 1031 (1990).

Respondent then initiated state post-conviction proceedings. His claims were dismissed without an evidentiary hearing, and the Illinois Supreme Court affirmed in *People v. Mahaffey*, 165 Ill. 2d 445, 651 N.E.2d 174 (1995). This Court denied a petition for writ of certiorari in *Mahaffey v. Illinois*, 516 U.S. 977 (1995).

B. Federal Habeas Corpus Proceedings

On November 14, 1995, Respondent filed a petition for writ of habeas corpus in the Northern District of Illinois, Eastern Division, pursuant to 28 U.S.C. § 2254. The District Court, who had jurisdiction pursuant to 28 U.S.C. § 2241, denied the petition. In rejecting Respondent's *Batson* claim, the District Court found "no reason to doubt the correctness" of the state trial judge's factual finding regarding the existence of a *prima facie* case. (App. E47).

Respondent appealed the denial of habeas relief to the Seventh Circuit, who had jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253. In the original panel decision in *Mahaffey v. Page* ["*Mahaffey I*"], the majority, the Honorable Judges Flaum and Cummings, found that with respect to the *Batson* claim, the state trial judge had "conducted a painstaking, thoroughly detailed analysis," and

only then "concluded that Mahaffey was unable to establish discriminatory motive on the part of the prosecution." (App. C16). The majority determined, however, that "the fact that the judge couched his finding in the context of a '*prima facie* showing' is of no consequence" in that "the prosecution bypassed this stage by proffering its non-discriminatory reasons." (App. C15). The majority consequently concluded that the state trial judge had decided the ultimate question of discriminatory intent, a finding of fact reviewed with great deference on appeal, and rejected Respondent's *Batson* claim accordingly. (App. C17-18).

Dissenting, the Honorable Illana Diamond Rovner stated that the only issue properly before the court "was whether Mahaffey had established a *prima facie* showing of discrimination." (App. C46). Finding that he in fact had, she concluded that "[t]he State of Illinois should once and for all be required to articulate its true reason for striking each of the seven African-American venire persons from the jury. . . ." (App. C51).

On October 26, 1998, the entire panel voted to grant rehearing. (App. D). On November 18, 1998, in its decision on rehearing ["*Mahaffey II*"], a majority of the panel, this time consisting of Judges Rovner and Cummings, reversed the judgment of the District Court and ordered the writ be granted unless, within 120 days, the state trial court holds a second hearing on Respondent's *Batson* claim. (App. A12-13).

Writing for the majority on rehearing, Judge Rovner substantially adopted her dissenting opinion in *Mahaffey I*. Specifically, she once again stated that the only issue properly before the court was "whether Mahaffey established a *prima facie* case of discrimination," a "mixed question of law and fact (citations omitted) which the appellate court should review de novo." (App. A8). Acknowledging that some of the federal circuits have utilized

a clearly erroneous standard in reviewing that question, Judge Rovner instead relied on this Court's decision in *Ornelas v. United States*, 517 U.S. 690 (1996), to support her conclusion that de novo review is appropriate. (App. A8). Moreover, although never challenging the *Mahaffey I* majority's view that the state trial judge had "conducted a painstaking, thoroughly detailed analysis," and purportedly "sensitive" to the fact that the state trial judge was present during the jury *voir dire* and found that all the relevant facts and circumstances did not produce an inference of discrimination, the majority nonetheless concluded that Respondent, "as a matter of law," had established a *prima facie* case of discrimination at the *Batson* hearing. (App. A12). It further found that "the most important factor of this case, and one that the Illinois courts were too quick to overlook, is that all seven African-American members of the jury venire were excused by the State." (App. A9). Finally, the majority noted that the standard of review in this case is "largely beside the point" because, "even if a more deferential standard were applied," it would have to conclude that the state trial judge "clearly erred" in finding that no inference of discrimination arose from the facts and circumstances of the case. (App. A9).[2]

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[2] Based on the analysis he advanced in the original panel decision, Judge Flaum dissented. (App. A13).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because this case raises several important issues with respect to claims brought pursuant *Batson v. Kentucky* and its progeny, including *J.E.B. v. Alabama*, 511 U.S. 127 (1994) (applying *Batson* principle to gender-based discrimination), *Georgia v. McCollum*, 505 U.S. 42 (1992) (applying principle to peremptory challenges by criminal defendants), and *Edmonson v. Leeseville Concrete Co., Inc.*, 500 U.S. 614 (1991) (applying principle to private litigants in civil cases). First, the Seventh Circuit opinion in *Mahaffey II*, in holding that the issue of whether the opponent of the peremptory challenges has established a *prima facie* case of discrimination is to be reviewed de novo, conflicts with decisions of the First, Fourth, Fifth, Eighth, Ninth[3], and Eleventh Circuits (*see Brewer v. Marshall*, 119 F.3d 993, 1004 (1st Cir. 1997), *cert. denied*, 118 S.Ct. 1172 (1998); *Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996); *United States v. Stewart*, 65 F.3d 918, 923 (11th Cir. 1995), *cert. denied sub nom. Daniel v. United States* 516 U.S. 1134 (1996); *United States v. Vasquez-Lopez*, 22 F.3d 900, 901 (9th Cir.), *cert. denied*, 513 U.S. 891 (1994); *United States v. Branch*, 989 F.2d 752, 755 (5th Cir.), *cert. denied sub nom. Thompson v. United States*, 509 U.S. 931 (1993); *United States v. Gordon*, 974 F.2d 97, 100 (8th Cir. 1992); *United States v. Casper*, 956 F.2d 416, 418 (3rd Cir. 1992); *United States v. Moore*, 895 F.2d 484, 486 (8th Cir. 1990); *United States v. Grandison*, 885 F.2d 143, 146 (4th Cir. 1989), *cert. denied*, 495 U.S. 934 (1990)), as well as with *Batson* itself which expressed confidence that "trial judges, experienced in *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie*

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[3] There is a conflict within the Ninth Circuit on the issue. *See Turner v. Marshall*, 63 F.3d 807, 814 n.4 (9th Cir. 1995).

case of discrimination. . . ." 476 U.S. at 96-97. Decisions from the Tenth Circuit, however, indicate that de novo review is appropriate. *See United States v. Joe*, 8 F.3d 1488, 1498 (10th Cir. 1993), *cert. denied*, 510 U.S. 1184 (1994); *United States v. Hartsfield*, 976 F.2d 1349, 1355-56 (10th Cir. 1992), *cert. denied*, 507 U.S. 943 (1993). Petitioner respectfully submits that it is important that the Court resolve this conflict.

In addition, the *Mahaffey II* opinion, in relying almost exclusively on the number of African-American veniremen excused by the State in concluding that the Respondent, "as a matter of law," established a *prima facie* case of discrimination, conflicts not only with *Batson* itself, but with decisions of the First, Third, Eighth, Ninth and Tenth Circuits.[4] *See United States v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994), *cert. denied*, 514 U.S. 1055 (1995); *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992); *United States v. Dawn*, 897 F.2d 1444, 1448 (8th Cir.), *cert. denied*, 498 U.S. 960 (1990); *United States v. Clemons*, 843 F.2d 741, 746 (3rd Cir.), *cert. denied*, 488 U.S. 835 (1988); and *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir.), *cert. denied*, 484 U.S. 928 (1987). Decisions from the Second Circuit, however, indicate that numbers alone can be sufficient to establish a *prima facie* case under *Batson*. *See United States v. Alvarado*, 923 F.2d 253, 256 (2nd Cir. 1991); *United States v. Ruiz*, 894 F.2d 501, 505-06 (2nd Cir. 1990). Petitioner respectfully submits that it is important that that the Court resolve the conflict on this question as well.

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[4] There also appear to be conflicts within the Third, Eighth and Ninth Circuits on this question. *See Jones v. Ryan*, 987 F. 2d 960, 971 (3rd Cir. 1993); *United States v. Battle*, 836 F.2d 1085, 1085-86 (8th Cir. 1987); and *Turner v. Marshall*, 63 F.3d 807, 813 (9th Cir. 1995).

This case also raises the question of whether an appeals court, based on the sufficiency of the record, may evaluate on its own whether the proponent of the peremptory challenges has satisfied steps two and three of the *Batson* inquiry when the trial judge determined only that the opponent of the challenges had failed to establish a *prima facie* case. This is a procedural question which two members of this Court—Justice Stevens and Justice Breyer—have indicated deserves further consideration. *See Purkett v. Elem*, 514 U.S. 765, 775-76 (1995) (Stevens, J., Breyer, J., dissenting).

Finally, Respondent was sentenced to death fourteen years ago. This case illustrates the disruptive effect the writ of habeas corpus can have on the need for finality when, after the state trial judge, the state supreme court, the United States District Court and the original majority of the Seventh Circuit panel hearing the cause all agreed that Respondent had not been denied his equal protection rights under *Batson*, the majority on rehearing decides to remand back to state court for yet a second *Batson* hearing—a decision which could easily delay execution of sentence in this case by at least four or five years, depending on the review procedures Respondent seeks following the hearing. "At some point in time, the State's interest in finality must outweigh the prisoner's interest in yet another round of litigation." *Herrera v. Collins*, 506 U.S. 390, 426 (1993) (O'Connor, J., concurring). Petitioner respectfully submits that it appears necessary for this Court to reiterate that point and may effectively do so in this case.

ARGUMENT

I.

THE SEVENTH CIRCUIT OPINION, AS DO OPINIONS OF THE TENTH CIRCUIT, IMPROPERLY UTILIZES A DE NOVO STANDARD IN REVIEWING THE QUESTION OF WHETHER THE OPPONENT OF PEREMPTORY CHALLENGES ESTABLISHED A *PRIMA FACIE* CASE UNDER *BATSON* IN THE TRIAL COURT AND THEREBY CONFLICTS WITH DECISIONS OF A MAJORITY OF THE OTHER CIRCUITS, AS WELL AS *BATSON* ITSELF.

A. A Trial Court's Determination of Whether a *Prima Facie* Case Has Been Established Should Be Reviewed Under A Deferential Standard of Review.

This Court has clearly established that the determination of whether a prosecutor intended to discriminate on the basis of race, in challenging potential jurors, is entitled to great deference. *Hernandez v. New York*, 500 U.S. 352 (1991). That ultimate finding regarding intentional discrimination is entitled to great deference because it will turn primarily on the trial judge's evaluation of the credibility of the prosecutor's race-neutral reasons. *Id.* at 365. Likewise, whether the opponent of the peremptory challenges has initially established a *prima facie* case turns on an evaluation, peculiarly within the trial judge's expertise, of factors readily apparent to him or her during *voir dire*. As this Court stated in *Batson*, "We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination. . . ." 476 U.S. at 96-97. Moreover, this Court noted in *United States v. Armstrong*, when referring to its consideration of "'the standards for assessing a *prima facie* case'" in *Batson*:

> During jury selection the entire res gestae take place in front of the trial judge. Because the judge

> has before him the entire venire, he is well situated to detect whether a challenge to the seating of one juror is part of a 'pattern' of singling out members of a single race for peremptory challenges. (Citation omitted). He is in a position to discern whether a challenge to a black juror has evidentiary significance.

517 U.S. 456, 467-68 (1996). It necessarily follows that a trial court's determination of whether a *prima facie* case has been established should also be accorded great deference.

As the Seventh Circuit opinion acknowledges, several of the Circuits utilize a deferential standard to review the question of whether a *prima facie* case has been shown, both in civil and criminal cases on direct and collateral review. *See Brewer v. Marshall*, 119 F.3d 993, 1004 (1st Cir. 1997) (following *United States v. Bergodere*, 40 F.3d 512, 516 (1st Cir. 1994), which held that because a *Batson prima facie* case determination is particularly fact-sensitive, it will be accepted unless clearly erroneous), *cert. denied*, 118 S.Ct. 1172 (1998); *Johnson v. Campbell*, 92 F.3d 951, 953 (9th Cir. 1996)[5] (according great deference to a trial court's determination regarding the establishment of a *prima facie* case because of the trial court's unique awareness of the totality of the circumstances, the factual nature of the determination, and the judge's ability to observe all of the parties); *United States v. Stewart*, 65 F.3d 918, 923 (11th Cir. 1995) (giving great deference to the trial court's finding as to the existence of a *prima*

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[5] There is a conflict within the Ninth Circuit, *see Turner v. Marshall*, 63 F.2d 807, 814 n.4 (9th Cir. 1995) (holding that although deference should be given to a state court's ultimate finding regarding discrimination, no deference is appropriate where the state court simply denied the existence of a *prima facie* case. *See also Wade v. Terhune*, 1998 U.S. Dist. LEXIS 6763, *9 (N.D. Ca. 1998) (agreeing in dicta that the *Turner* panel "was probably correct. . . .").

facie case), *cert. denied sub nom. Daniel v. United States* 516 U.S. 1134 (1996); *United States v. Branch*, 989 F.2d 752, 755 (5th Cir.) (holding that a finding that the defendant did not make a *prima facie* case of discrimination under *Batson* is reviewed for clear error), *cert. denied sub nom. Thompson v. United States*, 509 U.S. 931 (1993); *United States v. Casper*, 956 F.2d 416, 418 (3rd Cir. 1992) (holding that a trial court's determination that a defendant has failed to make a *prima facie* showing of discrimination in violation of the Equal Protection Clause will be reversed only if that determination is clearly erroneous); *United States v. Moore*, 895 F.2d 484, 486 (8th Cir. 1990) (noting that the *Batson* decision placed great confidence in a trial judge's ability to identify a *prima facie* case of race discrimination in holding that a trial court's ruling on the *prima facie* case is entitled to great deference); *United States v. Grandison*, 885 F.2d 143, 146 (4th Cir. 1989) (noting the "pivotal role" of the trial judge in determining a *prima facie* case under *Batson* and holding that such findings are entitled to great deference and will not be disturbed unless clearly erroneous), *cert. denied*, 495 U.S. 934 (1990).

The Tenth Circuit, however, utilizes a de novo standard of review. *See United States v. Joe*, 8 F.3d 1488, 1498 (10th Cir. 1993) (stating that "[t]his court reviews a challenge to the improper striking of prospective jurors based on their race de novo . . . ."), *cert. denied*, 510 U.S. 1184 (1994); *United States v. Hartsfield*, 976 F.2d 1349, 1355-56 (10th Cir. 1992) (same), *cert. denied* 507 U.S. 943 (1993).

The Seventh Circuit held that the preliminary question of whether a *prima facie* case has been shown presents a mixed question of law and fact, which appellate courts should review de novo. (App. A8). To be sure, confusion has arisen in lower state and federal courts regarding whether, because the *Batson prima facie* case determination involves a question of legal sufficiency, it is a ques-

tion over which appellate courts must have plenary review. *Compare Valdez v. People*, 966 P.2d 587, 1998 Colo. LEXIS 625, *14-15 (Colo. 1998) (holding that a *Batson prima facie* case determination involves a question of legal sufficiency over which the appellate court must have plenary review), *State v. Sledd*, 250 Kan. 15, 825 P.2d 114, 119 (Kan.) (same), *cert. denied*, 506 U.S. 849 (1992), *and State v. Butler*, 795 S.W.2d 680, 687 (Tenn. Crim. App. 1990) (same), *with United States v. Bergodere*, 40 F.3d at 516 (First Circuit case holding that even though the *Batson prima facie* determination can be characterized as a mixed question of law and fact, it is fact-sensitive, and, thus should be reviewed under the clear-error standard). Indeed, even if the question is a mixed one, this Court has reviewed mixed questions of law and fact on a deferential basis, "depending upon essentially practical considerations." *Ornelas v. United States*, 517 U.S. 690, 700 (1996) (Scalia, J., dissenting). *See Miller v. Fenton*, 474 U.S. 104, 113-14 (1985) (citing examples of issues treated deferentially on review because, as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue).

In considering the proper standard for reviewing whether a *prima facie* case under *Batson* has been established, some lower courts have also sought guidance from cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. *See Valdez*, 1998 Colo. LEXIS 625, *13-14; *Sledd*, 825 P.2d at 119; *Butler*, 795 S.W.2d at 687. However, a trial court which makes the *prima facie* case determination under *Batson* is in an even better position, vis-a-vis an appellate court, than in a Title VII case because the trial court's findings on the *Batson* issue stem from firsthand knowledge and observation of the *voir dire* proceedings. *See United States v. Grandison*, 885 F.2d at 146 (finding that district court's findings stemmed from firsthand knowledge and observation of the critical events and, therefore, was in a more advantageous position vis-a-vis

an appellate court, than in a Title VII case). Accordingly, the Title VII analogy is not entirely appropriate and further guidance from this Court on the question is necessary.

B. Ignoring *Batson's* Expressed Confidence in Trial Judges' Ability to Decide Whether A *Prima Facie* Case Has Been Established Threatens to Render Step One of the *Batson* Inquiry Nonfunctional and Thereby Risks Undermining the Contribution the Peremptory Challenge Makes to the Administration of Justice.

Ignoring the *Batson* Court's confidence in trial judges' ability to decide if circumstances concerning the use of peremptory challenges create a *prima facie* case of discrimination threatens to render the *prima facie* case requirement nonfunctional. *Batson* expressly requires that a trial court should not compel the prosecutor to reveal his or her motives for exercising peremptory challenges unless the defendant has raised an inference of intentional discrimination. In this way, *Batson* accommodates competing interests, balancing "the full peremptory character of the historic challenge" (476 U.S. at 97), which "occupies an important position in our trial procedures" (*id.* at 98), against the prevention of intentional discrimination in jury selection. *See* Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 *J. Crim. L. & Criminology* 1, 41 (1988). However, appellate disregard of a trial judge's finding of no *prima facie* case sends a message to trial courts which is inconsistent with the express language of *Batson*, encouraging apathy toward, as well as perhaps the elimination of, step one of the *Batson* inquiry. *See id.* Specifically, even if a defendant utterly fails to establish a *prima facie* case of discriminatory intent, a trial court may nonetheless feel compelled to inquire into the motives of the proponent of the challenge in order to protect the

ruling from upset on review. *See id.* at 41-42. If the *prima facie* case requirement is essentially eliminated, then *Batson* indeed "undermine[s] the contribution the challenge generally makes to the administration of justice." *Batson*, 476 U.S. at 98-99.

C. *Ornelas v. United States*, Which the Seventh Circuit Relied Upon To Support Its View That De Novo Review Is Appropriate, Is Inapposite.

The *Mahaffey II* majority's reliance on this Court's decision in *Ornelas*, in support of its conclusion that de novo review is appropriate, is misplaced. The Court in *Ornelas* made clear that "probable cause" and "reasonable suspicion" are reviewed de novo because the constitutional rules involved "acquire content only through application." 517 U.S. at 697. "Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, those legal principles." *Id.*, citing *Miller v. Fenton*, 474 U.S. at 114 (where the Court distinguished between cases in which the "relevant legal principle can be given meaning only through its application to the particular circumstances of the case," and those in which the issue involves credibility determinations or evaluations of demeanor, where the trial judge is thought to be in a far superior position to decide the question). Clearly, as argued above, whether or not a *prima face* case under *Batson* has been shown is a question of the latter species since the trial judge, with his or her expertise and superior familiarity with the issues and the parties, is better able to make the determination. Moreover, even in *Ornelas*, the Court made clear that a reviewing court must take care to review findings of historical fact only for clear error and to give "due weight to inferences drawn from those facts by resident judges" who "view[ ] the facts of a particular case in light of the distinctive features and events of the community[.]" *Id.* at 699. As Petitioner

illustrates below, the majority in *Mahaffey II* gave no such "due weight" to any factual finding or inference of the state trial judge below.

D. Had the Seventh Circuit Applied A Deferential Standard of Review, the Result of the Case Would Have Been Different.

The majority in *Mahaffey II* indeed professed its "sensitivity" to the fact that the state trial judge was present during *voir dire* and had found that all the relevant facts and circumstances did not produce an inference of discrimination. (App. A11). The majority even purported to alternatively engage in a more deferential review, stating that "if a more deferential standard were applied," it would have to conclude that the trial judge had "clearly erred." (App. A9). However, had the court truly shown deference to findings of the trial judge, it could not have arrived at the result it did.

This Court has held that "where the evidence would support a conclusion either way but . . . the trial court decided it to weigh more heavily for [one of the parties], such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.'" *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). The District Court below concluded that the state trial judge might very well have "decided the question the other way, but on this record, given his participation in the jury selection, his judgment that there was no *prima facie* case was permissible." (App. E47). However, the *Mahaffey II* majority independently reviewed the totality of the circumstances and concluded that the facts in this case, "as a matter of law," required the State to come forward with race-neutral explanations for each of the challenged strikes. (App. A12).

Moreover, it cannot be ignored that this is a Section 2254 case in which the factual findings of the state courts

are presumed to be correct, and may be set aside only if they are "'not fairly supported by the record.'" *Purkett v. Elem*, 514 U.S. at 769, quoting 28 U.S.C. § 2254(d)(8). In order to reject the presumption of correctness, a federal habeas court must "more than simply disagree with the state court." *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983). Here, however, the majority in *Mahaffey II* did not even attempt to conclude that the state trial judge's finding of no *prima facie* case, or any of its subsidiary factual findings connected with that determination, were not fairly supported by the record. Moreover, the disagreement among various state and federal court judges who have examined this case, and the District Court's acknowledgment that the state trial judge could very well have "decided the question the other way," all indicate that the presumption of correctness should be enforced. *See Caldwell v. Maloney*, 159 F.3d 639, 655 (1st Cir. 1998). *See also Wainwright v. Goode*, 464 U.S. 78, 85 (1983) (noting the number of state and federal judges who had disagreed on the issue in question, stating that, "at best, the record is ambiguous," and concluding that "because both . . . conclusions find fair support in the record, we believe the [Eleventh Circuit] erred in substituting its view of the facts for that of the Florida Supreme Court").

1. The Majority in *Mahaffey II* First Ignored the Explicit Factual Finding of the Illinois Supreme Court that the State Trial Judge Had Conducted "A Detailed Analysis" of the Veniremen Which the State Had Challenged—A Finding Recognized by Both the District Court and the Majority in the Original Panel Decision.

The *Mahaffey II* majority first ignored the explicit factual finding of the Illinois Supreme Court that the state trial judge had gone "into a detailed analysis of the jurors" the State struck from the jury (App. H20)—a

finding recognized by the District Court and the majority in *Mahaffey I*. (*See* App. E46 where District Court notes that "the heart" of the trial judge's ruling was his "detailed analysis of the jury selection process, one in which he, rather than counsel, put questions to the venire"); (App. C16 where *Mahaffey I* majority notes that the trial judge "conducted a painstaking, thoroughly detailed analysis" of the *voir dire* which "spanned seven days," and "only then concluded that Mahaffey was unable to establish discriminatory motive"). The *Mahaffey II* majority ignored this factual finding without first making the requisite determination that it was "not fairly supported by the record." The majority's disregard of this finding also demonstrates its refusal to acknowledge that it was in fact the trial judge who was in the best position to conduct such an observation-based analysis of the veniremen and the jury selection process at Respondent's trial.

2. The Majority in *Mahaffey II* Also Ignored All of the Explicit Factual Findings Made by the Trial Judge With Respect to the Challenged Jurors, All of Which Related to their Ability to Serve on the Jury in Respondent's Particular Case.

The *Mahaffey II* majority also ignored the following specific factual findings which the state trial judge made regarding the stricken jurors:

> a. When, during the original *voir dire* questioning, certain jurors raised some doubt regarding imposition of the death penalty, the State excused them—four whites and two blacks—even though they eventually stated they could be fair and follow the law, (BH Tr.[6] 52);

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[6] "BH Tr." refers to the record from Respondent's *Batson* hearing which was filed in the Seventh Circuit.

b. Of those veniremen who stated that they had previously heard of the case, five were black, four were white, and all were excused by the State. (BH Tr. 52);

c. Of those accused of a crime, two were white, one was black, and all three were excused by the State. (BH Tr. 52);

d. Three blacks and one white were either ill or taking medicine, and all were excused by the State. (BH Tr. 52);

e. Two blacks and two whites were excused by the State who strenuously raised the question of hardship. (BH Tr. 52);

f. One white and two blacks raised a question regarding whether they believed the defendant had to do something to prove his innocence, and all were excused by the State. (BH Tr. 53);

g. One black and one white indicated that they had some type of case in court at some time, and both were excused by the State. (BH Tr. 53);

h. One black and two whites, who stated that they would give added weight to police testimony, were excused by the State even though they subsequently indicated they would follow the law. (BH Tr. 53); and

i. Five whites and two blacks, who indicated they were victims of crime, were excused by the State. (BH Tr. 53).

It was error for the *Mahaffey II* majority to ignore these explicit factual findings, which showed that there were reasons apparent from the record, unrelated to race, which justified challenging the stricken jurors.

3. The *Mahaffey II* Majority Further Ignored the Fact, As Found by the Illinois Supreme Court, that the Trial Judge Had Used His Experience, As Well As His Superior Knowledge of Local Conditions and Prosecutors, In Determining that the State Was Not Motivated By Discriminatory Intent.

The *Mahaffey II* majority further failed to consider the state trial judge's unequivocal statement that he was personally familiar with one of the prosecutors and knew that the man was not, as *Batson* phrased it, "of a mind to discriminate." The judge stated on the record that he had a "great deal of experience" with one of the trial prosecutors, . . . and that he had "never found [him] to be one who practiced any type of discrimination at all . . . [and that] [h]e is not that type of person." (BH Tr. 46-47). This finding was considered by the Illinois Supreme Court in concluding that the trial judge had "used his experience, as well as his superior knowledge of local conditions and prosecutors, in determining that the State's peremptory challenges were not motivated by impermissible racial-group bias." (App. H28). Once again, the majority ignored these findings without first making the required determination that they were "not fairly supported by the record."

E. The *Mahaffey II* Decision, Which Relies Almost Exclusively on the Sheer Number of Minorities Challenged in Finding that, "As a Matter of Law," Respondent Established A *Prima Facie* Case, Along With Decisions of the Second Circuit, Conflicts With Decisions of the First, Tenth, Third, and Eighth Circuits.

The *Mahaffey II* majority appeared to justify its complete disregard for the state trial judge's findings by pointing out that "the most important factor of this case, and one that the Illinois courts were too quick to overlook

is that all seven African-American members of the jury venire were excused by the State, meaning that not a single member of Mahaffey's own race was seated on the jury that decided his fate."[7] (App. A9). Based on these numbers, the majority found that it was "plainly . . . evident" that a pattern of strikes[8] was made against the African-American jurors. (App. A10).[9]

Although a pattern of challenges is a relevant circumstance in the *Batson* equation, it is certainly not the only relevant circumstance. Indeed, the *Batson* Court itself stated that a "pattern of strikes" was "merely illustrative"

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[7] There were 12 African Americans on the venire (18% of the venire), but five were excused for cause. (BH Tr. 53). A black woman was accepted as an alternate juror. (App. H19).

[8] It should be noted that at no time in either state or federal court, has Respondent ever argued that the State exercised a pattern of strikes against the black veniremen. *See People v. Mahaffey*, 539 N.E.2d at 1184. His main assertion has been simply that because all seven African-American veniremen were stricken, he established a *prima facie* case.

[9] Citing no legal authority, the majority also criticized the state trial judge for comparing the excused African Americans to the excused whites, when he "should have been comparing the excused African-Americans to the jurors who remained, for only through such a comparison could the judge assess whether race played any role in the State's challenges." (App. A11). However, nowhere in *Batson*, or any of its progeny, has this Court suggested that only through such a comparison can it be determined whether the proponent of the challenges exercised them in a discriminatory manner. In addition, the majority's finding that it was "significant" that the trial judge found that the whites who sat on Respondent's jury were similar to the African Americans who were excused (App. A12) is misleading. What the trial judge did, before specifically analyzing why each venireman, black or white, had apparently been challenged, was to note that "[a]ll the people who were excused were similar to the people who were chosen," in terms of vocation, gender, marital status, etc. (BH Tr. 51). This is a far cry from finding that the whites who sat on Respondent's jury were similar to the African-Americans the State excused, as the majority suggested.

when determining whether a *prima facie* case had been established in a given case. 476 U.S. at 97.[10] *See also* Serr & Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 *J. Crim. L. & Criminology* at 35-37 (stating that numbers "are relevant to the *prima facie* determination, but they are not, nor should they be," in and of themselves determinative").

The decision of the *Mahaffey II* majority, in relying almost exclusively on the number of black veniremen excused by the State, conflicts not only with *Batson* itself, but with decisions of the First, Third, Eighth, Ninth and Tenth Circuits. *See United States v. Bergodere*, 40 F.3d at 516 (First Circuit case holding that "[a] defendant who advances a *Batson* argument ordinarily should 'come forward with facts, not just numbers alone'"); *United States v. Esparsen*, 930 F.2d 1461, 1467 (10th Cir. 1991) (holding that "[b]y itself, the number of challenges used against members of a particular race is 'not sufficient to establish or negate a *prima facie* case'"); *United States v. Vaccaro*, 816 F.2d 443, 457 (9th Cir. 1987)[11] (finding that striking

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[10] *Batson* involved the exclusion of every African American on the venire—four total—which resulted in an all-white jury. 476 U.S. at 83. However, at no time did the Court find that those numbers constituted a "pattern" of strikes, or that the prosecution's use of those challenges was sufficient, in and of itself, to establish a *prima facie* case of discrimination. If the Court had made such a finding, it would have presumably remanded the case for a second-stage, rather than first-stage, hearing. *See* 476 U.S. at 100 (case remanded to trial court to determine if *prima facie* case had been established).

[11] *But see Turner v. Marshall*, 63 F.3d at 813 (Ninth Circuit case finding *prima facie* case established when prosecution used five of its nine peremptory challenges to strike African Americans from the jury, and distinguishing *Vaccaro* on the basis that the defendant there relied only a pattern of strikes and no other means by which to establish an inference of discrimination, and

(continued...)

all blacks (two) on the venire failed to satisfy the *Batson* requirement); *United States v. Dawn*, 897 F.2d 1444, 1448 (8th Cir. 1990)[12] (finding that "numbers alone are not sufficient to establish or negate a *prima facie* case"); and *United States v. Clemons*, 843 F.2d 741, 746 (3rd Cir. 1988)[13] (finding that "establishing some magic number or percentage to trigger a *Batson* inquiry would short-circuit the fact-specific determination expressly reserved for trial judges").

The Second Circuit, however, has routinely rendered decisions finding that numbers alone are indeed sufficient to establish a *prima facie* case under *Batson*. *See United States v. Alvarado*, 923 F.2d 253, 256 (2nd Dist. 1991) (holding that a challenge rate nearly twice the likely minority percentage of the venire establishes a *prima facie* case despite the fact there was "no indication that any of the prosecution's questions and statements during *voir dire* revealed evidence of discriminatory intent"); *United States v. Ruiz*, 894 F.2d 501, 505-06 (2nd Cir. 1990) (prosecutor's use of three of its six peremptories to strike three out of four Hispanic venirepersons establishes *prima facie* case). *See also McCrory v. Henderson*, 871

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[11] (...continued)
that the finding of lack of "pattern" was premised on the view that "just two" challenges does not establish a pattern (*id.* at 813 n.3)).

[12] There appears to be a conflict within the Eighth Circuit, *see United States v. Battle*, 836 F.2d 1085, 1085-86 (8th Cir. 1987) (*prima facie* case made when prosecutor used five of its six peremptories to strike five of seven African-Americans from jury panel).

[13] There also appears to be a conflict within the Third Circuit, *see Jones v. Ryan*, 987 F.2d 960, 971 (3rd Cir. 1993) (prosecutor's use of three of his seven available peremptories to strike three of four African-American venirepersons establishes *prima facie* case).

F.Supp. 597, 603 (W.D.N.Y. 1995) (statistical evidence can suffice to make a *prima facie* showing); *United States v. Santopietro*, 809 F.Supp. 1016, 1019 (D. Conn. 1992) ("Numbers alone may suffice to establish the requisite inference of discrimination.").

Petitioner respectfully requests that this Court resolve the confusion over whether numbers alone are sufficient to establish a *prima facie* case under *Batson*—confusion which has arisen even though *Batson* itself expressly requires courts to look to *all* the relevant facts and circumstances in assessing whether an inference of discrimination is shown.

II.

IN THE ALTERNATIVE, IF THE TRIAL JUDGE DID IMPROPERLY FIND THAT RESPONDENT FAILED TO MAKE A *PRIMA FACIE* SHOWING OF INTENTIONAL DISCRIMINATION, THEN, BASED ON THE SUFFICIENCY OF THIS RECORD, THE SEVENTH CIRCUIT COULD HAVE CONDUCTED ITS OWN STEP-TWO AND STEP-THREE INQUIRIES UNDER *BATSON*.

In the original panel decision, the majority determined that "the fact that the state trial judge couched his finding in the context of a '*prima facie* case' is of no consequence" in that "the prosecution bypassed this stage by proffering its non-discriminatory reasons" for challenging certain jurors. (App. C15). The *Mahaffey I* majority consequently concluded that the trial judge had decided the ultimate question of discriminatory intent, a finding of fact reviewed with great deference on appeal, and rejected Respondent's *Batson* claim. (App. C17).

Upon rehearing, the *Mahaffey II* majority found that the state trial judge had not actually considered the State's proposed reasons for the challenges and, consequently, held that the only issue before the court was whether the *prima facie* showing was met. (App. A7). The majority

further noted that "this conclusion would be mandated in any case" because Respondent never had an opportunity to address the State's rationale for excluding the African-American jurors and, therefore, it would be "inappropriate" to proceed on appeal to the ultimate issue of discrimination. (App. A7-8).

True, the state trial judge, the Illinois Supreme Court and the District Court all agreed that Respondent had not advanced beyond the first stage of the *Batson* inquiry. However, as the *Mahaffey I* majority recognized, the record in this case supports a finding that the prosecutor indeed offered race-neutral justifications, apparent of record. At the *Batson* hearing, the prosecutor referred to various pages of the record which supported the State's reasons for exercising challenges against each juror, including, but not limited to: the jurors' attitudes on the death penalty; their potential inability to follow the court's instructions on the law; their criminal records and prior experience with the police; their youthful age; their apparent reluctance to serve on the jury; or their prior knowledge of the case. (BH Tr. 20-24). Moreover, as the *Mahaffey I* majority also noted, the prosecutor further indicated that, in light of the evolving nature of the jury selection process, the State had used a "sliding scale of scrutiny" in determining whether or not a juror would be chosen or excluded. (App. C9). In other words, "[r]easons which may have existed at the very beginning of this jury selection may have been amended, excluded, or changed due to the composition of those already selected, the number of challenges used and the overall composition, or the overall totality of the circumstances concerning that individual juror's background." (App. C9).

In rebuttal, Respondent's counsel argued that the State had not only argued against a *prima facie* showing, but had offered its non-discriminatory justifications as well. (App. C10). Counsel stated, "'I believe, your Honor, the prosecutor has crossed over from the first stage into the

second stage and has offered a great deal of explanation on why there was in fact no exclusion of Blacks on grounds of race.'" (App. C10). Counsel then argued that some of the prosecutor's asserted justifications were pretextual, but requested further opportunity to respond to the State's proffered race-neutral reasons for the challenges. (App. C10).

This Court's per curiam opinion in *Purkett v. Elem* implicitly ratified the Eighth Circuit's decision in that case to evaluate on its own whether the State had satisfied step two of the *Batson* inquiry, even though the state trial judge had held only that the defendant failed at step one. 514 U.S. at 775-76 (Stevens, J., Breyer, J., dissenting). Justices Stevens and Breyer expressed their belief that this was the "correct resolution" of a "tricky procedural problem," but opined that it "deserves more consideration than the Court has provided." *Id.* The two justices also noted that if a reviewing court is able to evaluate whether the prosecutor satisfied step two, then "a new problem arises": "Who may evaluate whether the prosecutor's explanation was pretextual under step three of *Batson*?" *Id.* Again, they indicated that whether the reviewing court decides the question, or refers it back to the trial court, "should depend on the state of the record." *Id.*

The *Mahaffey I* majority concluded that the record in the present case is more than adequate to allow evaluation of the step-two and step-three inquiries under *Batson*.[14] It stated, "as should be apparent from our lengthy recitation of the *Batson* hearing proceedings," the State provided its race-neutral justifications for the use of its peremptory challenges. (App. C12-13). The majority fur-

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[14] In fact, the majority even determined that, notwithstanding the other various courts' findings to the contrary, the trial judge had indeed conducted the step-two and step-three inquiries himself.

ther noted that this fact was indeed recognized by Respondent's counsel at the *Batson* hearing, who stated that the prosecutor had crossed over from the first stage into the second stage and offered a great deal of explanation as to why the challenges were not racially motivated, as well as by the Illinois Supreme Court, who concluded that "the State gave its criteria for challenging the seven black veniremen, asserting the criteria applied to all veniremen, without regard to race." (App. C13-14).

It is the opinion of two members of this Court that "[u]nless a reviewing court may evaluate such [race-neutral] explanations when a trial court fails to find that a *prima facie* case has been established, appellate or collateral review of *Batson* claims will amount to nothing more than [a] meaningless charade. . . ." *Purkett*, 514 U.S. at 776. The Petitioner, therefore, respectfully requests that the petition for certiorari be granted in order that the full Court may address and clarify this aspect of *Batson* jurisprudence and settle the procedural problem of whether a reviewing court may, if the record is sufficient, conduct the step-two and step-three inquiries if it determines that the trial judge improperly failed to find that a *prima facie* showing was met.

CONCLUSION

Petitioner respectfully requests this Court grant certiorari to review these significant issues dealing with claims brought pursuant to *Batson* and its progeny, to resolve the conflicts which have arisen in connection with these issues, to provide a clear exposition of the standards and procedures which should guide the various state and federal courts in adjudicating *Batson* claims, and to recognize

the importance of the State's interest in finality in a case in which the sentencing order was entered fourteen years ago.

Respectfully submitted,

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Supreme Court, U.S.
FILED

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No. 981466 MAR 15 1999

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

THOMAS PAGE, Warden,

Petitioner,

v.

JERRY MAHAFFEY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SEPARATE APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

JERRY MAHAFFEY, Petitioner-Appellant, v. THOMAS PAGE, Warden, Respondent-Appellee.

No. 97-4137

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

162 F.3d 481; 1998 U.S. App. LEXIS 29496

November 19, 1998, Decided

SUBSEQUENT HISTORY: As Amended November 20, 1998.

Rehearing In Banc and Rehearing Denied January 15, 1999, Reported at: *1999 U.S. App. LEXIS 698.*

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 6623. James B. Zagel, Judge.

Original Opinion of August 6, 1998, now Partially Vacated, Reported at 1998 U.S. App. LEXIS 18189.

DISPOSITION: REVERSED judgment of district court and order the writ be granted unless, within 120 days, the state trial court holds a new hearing on Mahaffey's Batson claim in accordance with this opinion. Our prior opinion in *Mahaffey v. Page, 151 F.3d 671 (7th Cir. 1998),* vacated to the extent that it is inconsistent with this decision.

CORE TERMS: juror, excused, prima facie, prosecutor, prima facie case, peremptory, jury venire, venireperson,

race-neutral, defense counsel, jury selection, state trial, similarity, pretextual, articulate, venire, ultimate issue, prior opinion, raceneutral, proceeded, stricken, excluding, comparing, federal district, matter of law, racial group, come forward, voir dire, de novo, discriminate

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JUDGES: Before CUMMINGS, FLAUM, and ROVNER, Circuit Judges. FLAUM, Circuit Judge, dissenting.

OPINION BY: ROVNER

OPINION: ROVNER, Circuit Judge. This case is before us on rehearing by the panel solely of the Batson issue. The details of the crime are set forth in our prior opinion, *Mahaffey v. Page, 151 F.3d 671 (7th Cir. 1998)*. We need only review the facts relevant to the Batson issue.

Jerry Mahaffey was convicted of murder, attempted murder, aggravated battery, home invasion, armed robbery, residential burglary, and theft, and ultimately sentenced to death, by a jury comprised of eleven whites and one Asian-American. Mahaffey [*2] and his brother, African-Americans from the South side of Chicago, were accused of these heinous crimes against three white victims from the North side of the city. The State exercised peremptory challenges against all seven African-American members of the jury venire.

While Mahaffey's direct appeal to the Illinois Supreme Court was pending, the United States Supreme Court decided *Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986).* In accordance with the mandate of Batson, the Illinois Supreme Court remanded Mahaffey's case, ordering the trial court to conduct a hearing and to determine whether jury selection complied with that decision. After conducting that hearing, the state trial judge concluded that Mahaffey had failed to establish a prima facie case of discrimination under Batson. The Illinois Supreme Court affirmed on that basis, and the federal district court subsequently declined to issue a writ of habeas corpus. In finding no Batson violation in the selection of Mahaffey's jury, both the state supreme court and the federal district court effectively deferred to the trial court's conclusion that Mahaffey had failed to establish a prima facie case. See [*3] *People v. Mahaffey, 128 Ill. 2d 388, 539 N.E.2d 1172, 1184-85, 132 Ill. Dec. 366 (Ill. 1989),* cert. denied, *497 U.S. 1031 (1990); United States ex rel. Mahaffey v. Peters, 978 F. Supp. 762, 781-82 (N.D. Ill. 1997).*

I.

As an initial matter, we must determine whether the trial court ever proceeded beyond the prima facie determination in this case. The petition for rehearing and answer to that petition have clarified, and our review of the record confirms, that the trial court never ventured beyond that first stage of the Batson inquiry. Indeed, all courts that have reviewed this case to this point are in agreement on that point, and their con-

struction of the record is entitled to deference. Moreover, the trial court never developed the facts that would be necessary for the next stages of the Batson analysis; specifically, the court did not elicit facts to compare excluded African-American jurors with accepted jurors, instead focusing on a comparison of excluded jurors with one another. Finally, because the trial court dismissed Mahaffey's Batson claim at the prima facie stage, the government was never required to articulate its actual reasons for striking the African-American jurors [*4] and defense counsel consequently was never given an opportunity to address the prosecutor's true reasons for the exclusions.

A Batson hearing normally progresses through 3 stages: (1) the defendant must make a prima facie showing that the prosecutor has exercised peremptory challenges on the basis of race; (2) once that showing has been made, the burden shifts to the prosecutor to articulate a raceneutral explanation for striking the jurors in question; (3) the trial court, after hearing the defendant's response, must decide whether those reasons are pretextual and whether the defendant has thus carried his burden of proving purposeful discrimination. *Batson v. Kentucky, 476 U.S. 79, 96-98, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986).* There are allowable deviations from this three-step process. In *Hernandez v. NY, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991),* the Supreme Court held that if the prosecutor immediately proceeds to give race-neutral reasons and the trial court rules on the ultimate question of intentional discrimination, there is no constitutional problem merely because the court bypassed the prima facie stage.

In this case, however, the court never proceeded [*5] beyond the prima facie determination, and the State was not called upon to articulate its reasons for exercising peremptory challenges against the African-American members of the venire. In addressing Mahaffey's prima facie showing, the State did note certain explanations for its exclusions of the African-American venirepersons that were "apparent" from the record. The discussion of those "apparent" reasons for exclusion has generated some inconsistent arguments in the briefs as to just how far the Batson inquiry proceeded. Mahaffey argues, for example, that the district court erred in failing to proceed beyond the prima facie stage of the analysis. He further contends, however, that the explanations the State proffered for excluding the African-American jurors were pretextual, and that we should find discrimination as a matter of law. This implies that the State provided its actual reasons for the challenges with respect to every African-American excluded, and that we can reach the ultimate issue of discrimination as the court did in Hernandez. Somewhat inconsistently, Mahaffey also argues that if we find that the reasons are not pretextual, the case should be remanded to allow him [*6] an opportunity to address the government's actual reasons individually.

The defendant's characterization of the Batson hearing in this case unnecessarily obfuscates the only issue properly before this Court. The state trial court, state supreme court, district court, and the State itself in its brief, all maintain that the Batson hearing was limited to the prima facie determination. Although the State provided more detailed reasons for its challenges than is perhaps necessary at that stage, it has consistently

asserted that it never provided the actual reasons for its challenges of each potential African-American juror. See, e.g., Brief of Attorney General at p.13 (arguing that only "apparent," not actual reasons were provided and declaring that "the prosecution never tendered 'race-neutral' reasons at trial, nor during any appellate proceeding, state or federal."). Instead, the State limited its explanations to identification of "apparent" similarities on the record between excluded white venirepersons and excluded African-Americans, arguing that those apparent similarities negated any inference of discrimination.[1] Those apparent similarities, howev-

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[1] This difference between actual and apparent reasons is not one of semantics. Apparent reasons are those that are discernible on the record, regardless of whether they were the actual motivation for the challenges. As the Attorney General argued and the district court found, the apparent explanations were "directed to explaining the pattern of challenges" used during the jury selection. One could imagine a case in which all stricken jurors were attorneys, for example, in which the apparent explanation could negate an inference of race discrimination, regardless of whether the attorney status was the actual reason for each strike. In such a case, the apparent reasons might be sufficiently convincing that the court would not require the prosecutor to come forward with actual reasons.

The discussion of apparent reasons for the challenges in this case thus consisted of pointing to characteristics on the face of the voir dire record which demonstrated a similarity among stricken jurors. For instance, the prosecutor pointed out that both an African-American and a white juror excluded were under age 25. Such "apparent" reasons were designed to indicate a pattern of challenges against African-American members of the venire explainable on grounds other than race. If a prima facie violation had been found, the State would have been forced to identify a race-neutral justification for each

(continued...)

er, cannot be mistaken for the [*7] actual reasons for the challenges. Only after the defendant establishes a prima facie case is the State required to reveal its actual reasons for the exclusions. Moreover, at that stage, the relevant comparison is between the excluded African-Americans and the jurors that were allowed to sit on the jury. Because the trial judge never reviewed the actual reasons for the challenges and did not compare the excluded African-American venirepersons with those accepted on the jury, we are limited on appeal to determining whether the prima facie showing was met.

[*8] We note that this conclusion would be mandated in any case because the trial court informed Mahaffey that he could respond to the raceneutral reasons after the prima facie determination was made. Although Mahaffey's counsel argued at some length that the challenges demonstrated discrimination, he also repeatedly noted that he would respond in more detail if the court determined that the prima facie showing was met. The court ultimately found to the contrary, of course, and thus Mahaffey never had the opportunity to address the State's rationale for excluding the African-American jurors. In those circumstances, it would be inappropri-

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[1] (...continued)

excluded African-American juror (its "actual" reasons), and defense counsel would have been able to rebut that justification for each juror. Continuing the above example, if the prosecutor had asserted age as the actual reason for excluding the juror, the defense counsel could have argued that it was pretextual because four white jurors in their twenties were not excluded.

ate for us to proceed on appeal to the ultimate issue of discrimination even with a more complete record.

II.

Therefore, the only issue properly before us today is whether Mahaffey established a prima facie case of discrimination. Unlike the ultimate issue of discriminatory intent, which as a factual question is entitled to deferential review (see *Batson, 476 U.S. at 98 n.21),* the preliminary question of whether a prima facie case has been shown presents a mixed question of law and fact (see, e.g., *United States v. Bergodere, 40 F.3d 512, 516 (1st Cir. [*9] 1994),* cert. denied, *514 U.S. 1055, 131 L. Ed. 2d 318, 115 S. Ct. 1439 (1995); United States v. Alvarado, 891 F.2d 439, 443 (2d Cir. 1989),* vacated on other grounds, *497 U.S. 543 (1990)),* which the appellate courts should review de novo. Although some of our sister circuits have utilized a clearly erroneous standard in their review of that question (see *Bergodere, 40 F.3d at 516* (citing cases)), the Supreme Court's recent decision in *Ornelas v. United States, 517 U.S. 690, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996),* points in the direction of de novo review. The question of whether an inference of discrimination may be drawn from a set of undisputed facts relating to the racial makeup of the jury venire and the prosecutor's exercise of peremptory challenges is, like the probable cause question before the Court in Ornelas, one over which the appellate courts should exercise a degree of control that a clear error standard would not afford. *Id. at 697.* As in Ornelas, factual scenarios will recur in this context, and de novo review would allow for a measure of con-

sistency in the treatment of similar factual settings, rather than permitting different trial judges to reach inconsistent conclusions [*10] about the prima facie case on the same or similar facts. *Id. at 697-98;* cf. *Mahaffey, 978 F. Supp. at 781* ("This is not to say that Judge Hett could not have decided the question the other way, but on this record, given his participation in the jury selection, his judgment that there was no prima facie case was permissible."). Ultimately, however, the standard of review question is largely beside the point, for even if a more deferential standard were applied, we would have to conclude that Judge Hett clearly erred in finding that no inference of discrimination arose from the facts and circumstances here.

We recognize, of course, that Batson requires us to look to all the relevant facts and circumstances in assessing whether an inference of discrimination should arise. See *Batson, 476 U.S. at 96.* Yet by far the most important factor in this case, and one that the Illinois courts were too quick to overlook, is that all seven African-American members of the jury venire were excused by the State, meaning that not a single member of Mahaffey's own race was seated on the jury that decided his fate.[2] This is therefore not a case in which only one or two members of a particular racial [*11] group were excused while other members of the same racial group remained; it is instead a case where the State exercised seven of thirteen total challenges to

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[2] There was of course an African-American alternate who sat through Mahaffey's trial, but she did not deliberate on the verdicts either at the conviction or penalty phase, and she was admitted on the jury only after the State had exhausted its peremptory challenges.

exclude every member of Mahaffey's own race. That is fairly compelling evidence of discrimination, at least at the prima facie case stage, where the State has not yet been required to articulate its race-neutral reasons for striking the African-American jurors. An inference of discrimination is particularly appropriate in light of the Supreme Court's admonition in Batson that we be mindful of the fact that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *476 U.S. at 96* (quoting *Avery v. Georgia, 345 U.S. 559, 562, 97 L. Ed. 1244, 73 S. Ct. 891 (1953)).* The Supreme Court in Batson emphasized that an inference of discrimination may arise where the prosecutor makes a pattern of strikes against African-American jurors. *476 U.S. at 97.* Such a pattern plainly is evident in the State's juror challenges here, where the prosecutor excused each and every African-American member of the jury venire. See *McCain v. Gramley, 96 F.3d 288, 292 (7th Cir. 1996)* (inference [*12] of discrimination may be drawn "where there are only a few members of a racial group on the venire panel and one party strikes each one of them"), cert. denied, *520 U.S. 1147, 117 S. Ct. 1320, 137 L. Ed. 2d 482 (1997); United States v. Sowa, 34 F.3d 447, 452 (7th Cir. 1994)* (in challenge to use of peremptory challenges by defense counsel, court held that "the government easily made its prima facie case that the peremptory challenges were motivated by race; each and every black venireperson [six in all] was challenged."), cert. denied, *513 U.S. 1117, 130 L. Ed. 2d 796, 115 S. Ct. 915 (1995); Splunge v. Clark, 960 F.2d 705, 707 (7th Cir. 1992)* (prima facie case shown where both African-American members of the jury venire were excluded by the prosecution).

[*13] And lest we forget, the crimes at issue in this case were obviously racially-sensitive—Mahaffey, a young African-American male from Chicago's South side, was charged with murdering a white couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to Mahaffey's defense at trial, as well as to his arguments in mitigation at the capital sentencing phase. See *Williams v. Chrans, 945 F.2d 926, 943-45 (7th Cir. 1991),* cert. denied, *505 U.S. 1208, 120 L. Ed. 2d 877, 112 S. Ct. 3002 (1992).* Before the judgment of the essentially all-white jury in this case is executed, the State at least should be required to explain why it excused each venire person of Mahaffey's own race, and Mahaffey should be allowed to respond to those reasons.

We are sensitive to the fact that Judge Hett was present during the jury voir dire and that, in his view, all of the relevant facts and circumstances did not produce an inference of discrimination. Yet Judge Hett came to that conclusion only after comparing the seven African-Americans whom the State excused from the [*14] jury with the six whites who were similarly excused. The state trial judge essentially found that because the excused African-Americans and the excused whites had similar characteristics, an inference of discrimination should not be drawn from the decision to strike the African-Americans. Batson Hearing Tr. at 54. But rather than comparing the excused African-Americans to the excused whites, the trial judge should have been comparing the excused African-Americans to the jurors who remained, for only through such a compari-

son could the judge assess whether race played any role in the State's challenges. If an excused African-American juror had characteristics and opinions that were similar to those of a juror who sat, for example, then an obvious inference, at least prior to the articulation of a race-neutral explanation for the strike, would be that the strike was racially-motivated. As far as the voir dire record would reveal, the stricken juror's race would be the only characteristic distinguishing the African-American from the juror who was retained.

It is significant in that regard that Judge Hett found at the Batson hearing that the whites who sat on Mahaffey's jury were similar [*15] to the African-Americans the State had excused. Id. at 51. That finding suggests that the State may have used its peremptory challenges to single out African-American venirepersons for exclusion, in comparison to whites with the same or similar characteristics. And the inference of discrimination that would arise in that circumstance is unaffected by the fact that some whites with the same characteristics also may have been excused—the State still struck all the African-Americans while retaining some of the whites, and despite having strikes available that went unused.

In short, the showing made by Mahaffey at the Batson hearing was sufficient as a matter of law to require the State to come forward with raceneutral explanations for each of the challenged strikes. Because the court never required the State to do so, Mahaffey has established a Batson violation. The proper remedy for this Batson violation is the one set forth in *Coulter v. Gilmore, 155 F.3d 912, 922 (7th Cir. 1998).* We therefore REVERSE the judgment of the district court and

order that the writ be granted unless, within 120 days, the state trial court holds a new hearing on Mahaffey's Batson claim in accordance with [*16] this opinion. Our prior opinion in *Mahaffey v. Page, 151 F.3d 671 (7th Cir. 1998),* is vacated to the extent that it is inconsistent with this decision.

DISSENT BY: FLAUM

DISSENT: FLAUM, Circuit Judge, dissenting. Based on the analysis advanced in my prior opinion in this case, *Mahaffey v. Page, 151 F.3d 671, 675-680 (7th Cir. 1998),* I respectfully dissent. I remain of the view that the constitutional commands of *Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986)* have been met in this matter. Accordingly, I would deny the writ of habeas corpus and affirm the decision of the district court.

APPENDIX B

JERRY MAHAFFEY, Petitioner-Appellant, v.
THOMAS PAGE, Respondent-Appellee.

No. 97-4137

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

1999 U.S. App. LEXIS 698

January 15, 1999, Decided

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 6623. James B. Zagel, Judge Presiding.

Original Opinion of November 19, 1998, Reported at: *1998 U.S. App. LEXIS 29496.*

JUDGES: Before Honorable Walter J. Cummings, Circuit Judge, Honorable Joel M. Flaum, Circuit Judge, Honorable Ilana Diamond Rovner, Circuit Judge.

OPINION: ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by respondent-appellee on December 10, 1998, no judge in active service has requested a vote thereon, and a majority* of

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* Honorable Joel M. Flaum voted to grant a rehearing.

the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS HEREBY ORDERED that the petition for rehearing with suggestion for rehearing in banc be, and the same is, hereby DENIED.

APPENDIX C

Jerry Mahaffey, Petitioner-Appellant, v.
Thomas Page, Warden, Respondent-Appellee.

No. 97-4137

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

151 F.3d 671; 1998 U.S. App. LEXIS 18189

August 6, 1998, Decided

SUBSEQUENT HISTORY: Rehearing Granted October 26, 1998, Reported at: *1998 U.S. App. LEXIS 28201.*

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 95 C 6623. James B. Zagel, Judge.

Original Opinion of August 6, 1998, now Partially Vacated, Reported at: *1998 U.S. App. LEXIS 18189.*

DISPOSITION: Affirmed the judgment of the district court.

CORE TERMS: prima facie case, juror, prosecutor, peremptory, race-neutral, excused, veniremen, ineffective assistance, sentencing hearing, voir dire, sentence, prima facie, stricken, brother, confession, state trial, colleagues, venire, jury selection, death sentence, apartment, defense counsel, mitigating, proceeded, suppression hearing, death penalty, jury venire, pretextual, prison, mitigation

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JUDGES: Before Cummings, Flaum, and Rovner, Circuit Judges. ROVNER, Circuit Judge, dissenting.

OPINION BY: FLAUM

OPINION: [*674] Flaum, Circuit Judge. Jerry Mahaffey was convicted by an Illinois jury in 1985 of two counts of murder, along with one count each of attempted murder, aggravated battery, home invasion, rape, armed robbery, residential burglary, and theft. For these crimes, he was sentenced to death. On direct review, the Illinois Supreme Court affirmed his conviction and sentence, *128 Ill. 2d 388, 539 N.E.2d 1172, 132 Ill. Dec. 366 (Ill. 1989),* and the United States Supreme Court denied his petition for certiorari, *497 U.S. 1031 (1990).* Mahaffey's state petition for post-conviction relief was similarly unsuccessful. See *165 Ill. 2d 445, 651 N.E.2d 174, 209 Ill. Dec. 246* (Ill.), cert. denied, *516 U.S. 977 (1995).* He then filed this petition for federal habeas corpus relief,[1] which the district court denied.

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[1] Mahaffey filed his petition on November 14, 1995. Therefore, the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) do not apply to this case. See *Lindh v. Murphy, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997).*

See *United States ex rel. Mahaffey v. Peters, 978 F. Supp. 762 (N.D. Ill. 1997)*. Mahaffey now appeals the denial of the writ on a number of grounds rejected by the district [**2] court, and we affirm.

I.

Jerry Mahaffey, along with his brother Reginald, drove to Chicago's North Side on the night of August 29, 1983 to burglarize a clothing store. The Mahaffey brothers aborted that plan at some point, and they instead chose to climb through an open window and into the apartment of Jo Ellen and Dean Pueschel. The Pueschels, along with their then eleven-year old son Richard, were asleep at the time. After Reginald picked up a knife from the kitchen, the brothers first entered Richard's bedroom and proceeded to stab him with the knife and hit him over the head with a baseball bat that was in the bedroom. Reginald picked up a bat as well, and the brothers next proceeded into the Pueschels' bedroom, where they began to hit Dean Pueschel on the head with [**3] their bats. [*675] Jo Ellen was taken to another room, where she was raped and sodomized; at some point Jerry saw Dean Pueschel attempt to draw a gun in self-defense, so Jerry hit Dean over the head again with his bat. When both brothers went back into the Pueschels' bedroom to retrieve firearms that they had discovered, they saw Dean begin to move and stabbed him to death. Jo Ellen was taken out to the Pueschels' car, where she was forced to disarm the car's alarm system; she was then taken back into the apartment and beaten in the head with the butt of a pistol, which caused her death. This last beating oc-

curred in Richard's presence, who had regained consciousness by this point. Jerry wiped down the fingerprints on everything that he and Reginald had touched in the apartment. Leaving Richard for dead, the brothers fled in the Pueschels' car, taking with them jewelry, guns, and video equipment that they had stolen. Richard survived the attack and was discovered by his grandfather the next day, dazedly wandering in the alley near his parents' home.[2]

[**4] After receiving information from the Mahaffeys' brother, Cedric, police arrested both Jerry and Reginald. They confessed to authorities, and following a joint trial at which only Reginald testified, both Jerry and Reginald were convicted and sentenced to death.[3] Jerry Mahaffey's conviction and sentence were affirmed on appeal and state post-conviction review, and he now raises four arguments on appeal of the district court's denial of habeas corpus relief. First, he argues that the prosecution's exercise of its peremptory challenges at trial violated his Fourteenth Amendment rights. See *Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986).* Next, Mahaffey argues that the

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[2] For a more detailed account of the facts of this crime, see *People v. Mahaffey, 128 Ill. 2d 388, 539 N.E.2d 1172, 132 Ill. Dec. 366 (Ill. 1989).*

[3] The Illinois Supreme Court reversed Reginald's conviction on direct appeal, holding that his case should have been severed in light of Jerry's confession and the fact that Jerry did not testify at trial, which deprived Reginald of the ability to cross-examine his brother. See *People v. Mahaffey, 128 Ill. 2d 388, 539 N.E.2d 1172, 1183, 132 Ill. Dec. 366 (Ill. 1989).* On retrial, Reginald was again convicted and sentenced to death. See *People v. Mahaffey, 166 Ill. 2d 1, 651 N.E.2d 1055, 209 Ill. Dec. 607 (1995).*

prosecutor's closing argument at the sentencing hearing falsely implied that Mahaffey could receive a sentence less than natural life imprisonment if the jury refused to impose the death penalty. Mahaffey asserts that this misrepresentation violated his rights under the Eighth and Fourteenth Amendments. His third and fourth arguments assert that he received ineffective assistance from his trial counsel both at the sentencing hearing and in arguing a motion to suppress his confession. We will relate [**5] additional facts relevant to these arguments in the context of our discussion.

II.

A. Batson Challenge

While Mahaffey's case was pending in the Illinois courts on direct review, the Supreme Court held in *Batson v. Kentucky, 476 U.S. 79, 96-98, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986),* that a prosecutor's discriminatory use of peremptory challenges on the basis of race could violate a defendant's right to equal protection under the Fourteenth Amendment. Evaluation of a Batson claim entails a three-step [**6] process. See *id. at 96.* First, the defendant must make a prima facie showing that the prosecution has exercised peremptory challenges on the basis of race. If the defendant satisfies this threshold, the burden then shifts to the prosecution to articulate a race-neutral justification for the disputed challenges. If a race-neutral explanation is tendered, the court then must determine whether, in light of the proffered justification, the defendant has satisfied his burden of proving purposeful discrimination. See *id. at 96-98;* see also *Purkett v. Elem, 514*

U.S. 765, 767, 131 L. Ed. 2d 834, 115 S. Ct. 1769 (1995) (per curiam); *McCain v. Gramley, 96 F.3d 288, 290 (7th Cir. 1996),* cert. denied, *137 L. Ed. 2d 482, 117 S. Ct. 1320 (1997).*

Griffith v. Kentucky, 479 U.S. 314, 328, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987), subsequently held that Batson applied retroactively, and the Illinois Supreme Court therefore directed the trial court in Mahaffey's case to conduct [*676] a hearing to determine whether the prosecution had violated the Fourteenth Amendment in employing its peremptory challenges. Mahaffey, who is black, argued that the prosecution violated Batson when it exercised peremptories on [**7] all seven of the black veniremen who were considered for Mahaffey's petit jury. See *539 N.E.2d at 1175.* The trial judge found that Mahaffey could not establish a prima facie case of discrimination under Batson. The Illinois Supreme Court affirmed this finding, see *539 N.E.2d at 1185,* as did the district court below, see *978 F. Supp. at 781-82.* Mahaffey argues that the district court erred in holding that he failed to establish a prima facie case, and he further argues that he has established a case of purposeful discrimination under Batson that entitles him to a writ of habeas corpus. We reject this argument and affirm the district court's holding, though we employ a different analysis than the courts that previously have addressed Mahaffey's Batson claim.

1. Facts Relating to the Batson Claim

At the selection of Mahaffey's jury, seven black veniremen were presented for non-alternate seats following challenges for cause. The State, which was given a total

of 24 peremptory challenges (Jerry and Reginald Mahaffey were given 12 each), exercised a peremptory on each of the seven black veniremen presented for the jury, and also on six white veniremen. Mahaffey's trial counsel moved [**8] to dismiss the venire each time the prosecution struck a black venireman, arguing that the prosecution was improperly excluding blacks from the jury. This motion was renewed at the conclusion of voir dire, which had produced a jury composed of eleven white jurors and one Asian juror.[4] The trial judge, who had posed all of the questions to the potential jurors during the voir dire, expressed concern regarding the prosecution's use of its peremptories and invited the prosecution to come forward with race-neutral justifications for its exercise of peremptories. The prosecution declined to do so, as it was entitled to do prior to Batson, and the court denied Mahaffey's motion to dismiss the venire.

While Mahaffey's appeal was pending in the Illinois Supreme Court, that court ordered the trial judge, Thomas Hett, to [**9] conduct a Batson hearing to address Mahaffey's claim that the prosecution had discriminated in exercising its peremptory challenges. In accordance with the procedures outlined in Batson, see *476 U.S. at 96-98,* Judge Hett was directed to permit Mahaffey to present evidence in support of his claim of unconstitutional discrimination and, if the court found that Mahaffey had established a prima

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[4] The prosecution also had two peremptory challenges in the selection of alternate jurors. It exercised both of them on white veniremen, and a black venireman was subsequently seated as an alternate.

facie case of discrimination, to require the prosecution to produce race-neutral justifications for the questioned challenges. See *539 N.E.2d at 1175*. In support of his claim that the evidence established a prima facie case under Batson, Mahaffey emphasized that, following dismissals for cause, the prosecution used its peremptory challenges to remove all of the black veniremen presented for service on the jury. In addition, he argued that the fact that the prosecution had exercised a majority of its peremptory challenges—by a seven to six margin—on black veniremen further established a prima facie case. Further, Mahaffey pointed out that during the voir dire Judge Hett had asked the prosecution to explain the reasons for its use of its peremptory challenges. Mahaffey argued that Judge Hett's [**10] concern was itself indicative of a prima facie case.

In response, Assistant State's Attorney Paul Tsukono[5] first argued that Mahaffey had not established a prima facie case. In this regard, the prosecution pointed out that it had accepted a black woman to serve as an alternate juror, which it believed served to refute Mahaffey's discrimination claim. Further, the prosecution noted that, including the two peremptory challenges that it exercised in selecting alternate jurors, a majority [*677] of its peremptories had been directed towards white veniremen—by an eight to seven margin.

The Assistant State's Attorney then proceeded to offer non-discriminatory reasons for the prosecution's exercise of its peremptories. Tsukono prefaced his analysis:

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[5] Tsukono had earlier participated in both the jury selection and prosecution of Mahaffey's case.

"Now, the People's challenges against the minority jurors can be examined from two bases, I suggest individually and collectively. I suggest that there are reasons which are revealed [**11] from the voir dire, reasons which are apparent from the record which justify the State's challenges against these minority jurors." The prosecutor then proceeded to describe the justifications for exercising peremptories against the stricken black veniremen, and he tied these justifications to each of them individually. Some prospective jurors, for example, demonstrated an unwillingness to impose the death penalty, even though they had not been stricken for cause; some had also demonstrated an unwillingness or an inability to follow instructions. The prosecution also noted that it had exercised peremptories on the bases of occupation, youth, prior experience with the police, reluctance to serve on the jury, and prior knowledge of the Pueschels' murders. All of these justifications, the prosecution stated, had been used to strike both black and white veniremen. Tsukono also noted that, in light of the evolving nature of the jury selection process, the prosecution used a sliding scale of scrutiny in the determination of whether or not a juror would be chosen or excluded. Reasons which may have existed at the very beginning of this jury selection may have been amended, excluded, or changed [**12] due to the composition of those already selected, the number of challenges used and the overall composition, or the overall totality of the circumstances concerning that individual juror's background. The prosecutor then concluded his argument by asserting that Mahaffey had not made a prima facie showing under Batson.

In rebuttal, Mahaffey's counsel argued that the prosecution had not only argued against a prima facie showing, but that it had offered its nondiscriminatory justifications as well. He stated, "I believe, your Honor, the prosecutor has crossed over from the first stage into the second stage and has offered a great deal of explanation on why there was in fact no exclusion of Blacks on grounds of race." Mahaffey's counsel then argued that at least some of the prosecution's asserted justifications were pretextual. For example, while the prosecution asserted that reluctance to serve on the jury had been a justification for some of its peremptory dismissals, Mahaffey's counsel argued that other white jurors whom the prosecution had not dismissed had expressed a similar reluctance to serve. Other asserted justifications were also pretextual, Mahaffey's counsel argued, or were [**13] not applied consistently by the prosecution to the black and white members of the venire. Mahaffey's counsel concluded by stating that Mahaffey had established a prima facie case, though he requested further opportunity to respond to the prosecution's proffered non-discriminatory justifications.

Judge Hett, in announcing his decision, indicated that he had made a "detailed analysis of the jury selection process" by reading and taking notes regarding the entire transcript of the voir dire (which had spanned seven days), along with copies of the jury cards for all of the prospective jurors. In explaining his own detailed analysis, Judge Hett noted that personal characteristics (which the prosecution had not proffered as its race-neutral justifications), such as gender, home ownership, and marital status, were similar in comparing the eight white veniremen who were stricken (including alter-

nates) with the seven black veniremen who were stricken. He further noted that those individuals seated on the jury did not differ significantly from those who were stricken with respect to these characteristics. He concluded, "all of the people who were excused were similar to the people who were [**14] chosen. The Whites who were excused were similar to the Blacks who were excused."

At this point, Judge Hett went on to consider the potential jurors' responses to his voir dire questioning in light of the prosecution's asserted non-discriminatory justifications. With respect to willingness to impose the death penalty, for example, Judge Hett [*678] found that "where there was any question raised by the juror as to penalty, . . . there were four Whites and two Blacks who were excused by the State." Of the veniremen who had previously been accused of crimes, Judge Hett identified two white and one black veniremen, all of whom were stricken.[6] In conclusion, Judge Hett noted that, looking at the totality of the circumstances, "I do not believe that there has been a showing, a prima facie showing that the State exercised their chal-

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[6] The dissent expresses the view that, "rather than comparing the excused African-Americans to the excused whites, . . . the trial judge should have been comparing the excused African-Americans to the whites who remained, for only through such a comparison could the judge assess whether race played any role in the State's challenges." Post at 41. While this observation is substantively cogent, we respectfully suggest that the trial judge proceeded in the fashion that the dissent would prescribe. As evidenced supra, Judge Hett's underlying inquiry reveals that he indeed considered the State's justifications with respect to the entire venire.

lenges in a manner that showed racial discrimination. They treated both the Blacks and the Whites who were being excused in the same way. It is apparent in the record that they used the same factors that I found as to Whites, again as to Blacks." Judge Hett therefore concluded that Mahaffey had failed to establish a prima facie case under Batson. [**15]

2. Discussion

Mahaffey argues that the lower courts erred in failing to recognize that he established a prima facie case. Further, he asserts that, notwithstanding the trial court's finding that he had not established an inference of discrimination, the prosecution tendered its race-neutral justifications to the court, and that these justifications are pretextual. Accordingly, Mahaffey asks us to reverse the district court and grant him relief on his Batson claim.

It is true that Judge Hett couched his decision in the context of whether Mahaffey had established a prima facie case. Moreover, the Illinois Supreme Court grounded its analysis in the context of whether, considering "all relevant circumstances," the trial court's prima facie case determination was against the manifest weight of the evidence. See *539 N.E.2d at 1184.* The district court similarly rejected Mahaffey's claim on the basis that there was no reason to doubt the correctness of Judge Hett's factual finding regarding the existence of a prima facie case. See *978 F. Supp. at 781.* It is also true, however, as should be apparent from our lengthy recitation of the Batson hearing proceedings, that the State provided [**16] its race-neutral justifica-

tions for the use of its peremptory challenges.[7] This fact

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[7] In both its brief to this Court and at oral argument, the State contended that it never has offered race-neutral justifications for its peremptory challenges, solely because Mahaffey never has established a prima facie case of discrimination. This contention is clearly wrong factually, as Assistant State's Attorney Tsukono offered at the Batson hearing "reasons which are apparent from the record which justify the State's challenges against these minority jurors." Tsukono then discussed five of the seven stricken black veniremen individually, discussing justifications such as a hesitancy regarding imposition of a death sentence, or problems in following the court's instructions. Further, he discussed justifications that applied to more than one venireman, such as a prior knowledge of the case, or a previous suspicion of criminal activity. These collective justifications applied to the two stricken black veniremen that Tsukono had not discussed individually, in addition to the five veniremen that he had previously discussed.

The State's legal justification for its position is essentially that, because it was not required under Batson to proffer race-neutral justifications until Mahaffey established his prima facie case, it necessarily could not have furnished those justifications before a prima facie case was established. This attributes far more significance to Batson's evidentiary burden-shifting approach than it deserves. In *Hernandez v. New York, 500 U.S. 352, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991),* on which the prosecution relies, the Supreme Court addressed a case in which the prosecutor justified his peremptory challenges before the trial court could decide whether a prima facie case had been established. A plurality of the Court recognized that "this departure from the normal course of proceeding need not concern us. . . . 'Where the [prosecutor] has done everything that would be required of him if the [defendant] had properly made out a prima facie case, whether the [defendant] really did so is no longer relevant.'" *Id. at 359* (quoting *United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 715, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983)).* This is because, as the Supreme Court has recognized in the related context of Title VII's burden-shifting approach, the prima facie case method was "never intended to be rigid,

(continued...)

[*679] was recognized by Mahaffey's counsel at the Batson hearing, see supra at 7-8, and by the Illinois Supreme Court, see *539 N.E.2d at 1181* ("Finally, the State gave its criteria for challenging the seven black veniremen, asserting that the criteria were applied to all veniremen, without regard to race.").

[**17] A plurality of the Supreme Court recognized in *Hernandez v. New York, 500 U.S. 352, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991),* that when a prosecutor offers race-neutral explanations for peremptory challenges and the trial court rules on the ultimate question of intentional discrimination, the issue of whether the defendant had satisfied his prima facie burden becomes moot. See *id. at 359.* This Circuit has followed that approach. See *McCain v. Gramley, 96 F.3d 288, 292 (7th Cir. 1996),* cert. denied, *137 L. Ed. 2d 482, 117*

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[7] (...continued)

mechanized, or ritualistic. Rather, it is merely a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." See *Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978).*

Regardless of whether the State was required to provide its race-neutral justifications at the Batson hearing, it certainly did so. The State's assertion that it did not provide those justifications simply because it was not required to do so lacks any foundation in precedent or in fact. This error in analysis is borne out by the district court's recognition that "in many cases, the prosecutor simply offers an explanation in response to an objection which makes the prima facie case decision unnecessary." *978 F. Supp. at 781.* Moreover, as Mahaffey suggests, the implication that the State could develop new justifications at this late date, after the State has already provided justifications for its challenges, would serve to pervert Batson's burden-shifting framework.

S. Ct. 1320 (1997); United States v. Cooper, 19 F.3d 1154, 1160-61 (7th Cir. 1994); see also *Matthews v. Evatt, 105 F.3d 907, 918* (4th Cir.) (following the same approach), cert. denied, *118 S. Ct. 102, 139 L. Ed. 2d 57 (1997); Johnson v. Love, 40 F.3d 658, 663-64 (3d Cir. 1994)* (same); *United States v. Johnson, 941 F.2d 1102, 1108 (10th Cir. 1991)* (same). This approach makes good sense, in light of the fact that the ultimate question always remains whether the opponent of the strike has satisfied the burden of persuasion regarding purposeful discrimination. See *Purkett v. Elem, 514 U.S. 765, 768, 131 L. Ed. 2d 834, 115 S. Ct. 1769 (1995)* (per curiam); cf. *St. Mary's Honor Ctr. v. [**18] Hicks, 509 U.S. 502, 510-11, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993).*

While Mahaffey makes a strong argument that he established a prima facie showing, we need not consider this issue, as the prosecution bypassed this stage by proffering its non-discriminatory reasons. It is evident from the Batson hearing transcript that Judge Hett considered the prosecution's justifications and concluded, in light of the "totality of the circumstances," that the prosecution had not exercised its peremptory challenges in a racially discriminatory manner. Assistant State's Attorney Tsukono provided justifications, such as an unwillingness to impose the death penalty, an inability to follow instructions, or a prior run-in with the police. Judge Hett conducted his own "detailed analysis" of the voir dire and discussed the State's justifications in the context of its use of peremptory challenges at voir dire. With respect to these justifications, Judge Hett found that the State's dismissals transcended racial lines. In conjunction with his knowl-

edge and recollection of the voir dire (at which he had expressed concern regarding the prosecution's use of its peremptories), as well as his prior interactions [**19] with Tsukono as a prosecutor—the totality of the circumstances—Judge Hett concluded that Mahaffey had not established purposeful discrimination. The fact that the judge couched his finding in the context of a "prima facie showing" is of no consequence. Evidence that is insufficient to establish even an inference of discrimination is certainly not sufficient to meet the opponent of the strike's ultimate burden of persuasion in proving purposeful discrimination. See *McCain, 96 F.3d at 293.* The trial judge considered all of the evidence that was available to him, along with his personal recollections regarding the prosecution's demeanor and approach at the voir dire. Indeed, in light of the concerns he expressed at voir dire, the judge conducted a painstaking, thoroughly detailed analysis, and only then concluded that Mahaffey was unable to establish discriminatory motive on the part of the prosecution.

[*680] A trial court's decision on the ultimate question of discriminatory intent constitutes a finding of fact that we review with great deference on appeal.See *Hernandez, 500 U.S. at 364; id. at 372* (O'Connor, J., joined by Scalia, J., concurring in the judgment). On federal habeas review, [**20] the factual findings of a state trial court "shall be presumed to be correct." *28 U.S.C. § 2254*(d) (1994); see also *Splunge v. Clark, 960 F.2d 705, 708 (7th Cir. 1992).* Aside from the statutory command of § 2254(d) in this context, deference to the trial court on the issue of discriminatory intent makes good sense, as the Court recognized in Hernandez:

> The finding largely will turn on evaluation of credibility. In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed. There will seldom be much evidence bearing on that issue, and the best evidence often will be the demeanor of the attorney who exercises the challenge. As with the state of mind of a juror, evaluation of the prosecutor's state of mind based on demeanor and credibility lies peculiarly within a trial judge's province.

500 U.S. at 365 (quotations and citations omitted). Unlike an appellate court, which must rely solely on a paper record, the trial court is in a unique position to review the credibility and demeanor of both the attorneys and the prospective jurors. See, e.g., *United States v. Cooper, 19 F.3d 1154, [**21] 1161 (7th Cir. 1994).*

As we have discussed, Judge Hett considered in detail the prosecution's race-neutral justifications, conducted his own analysis regarding whether any of these justifications were pretextual, and concluded that Mahaffey had not shown racial discrimination. Moreover, the Illinois Supreme Court fully considered the trial court's treatment of the Batson hearing and concluded: "The record shows that the trial judge used his experience, as well as his superior knowledge of local conditions and prosecutors, in determining that the State's peremptory challenges were not motivated by impermissible racial-group bias. We see no reason to disturb this finding." *539 N.E.2d at 1185.* We are similarly unaware of any reason to disturb the presumption of correctness that we are statutorily required to accord the state court's factual finding. See, e.g., *Pitsonbarger v. Gramley, 141 F.3d 728, 734 (7th Cir. 1998),* petition for cert.

filed, U.S.L.W. (U.S. July 8, 1998) (No. 98-5153). We therefore reject Mahaffey's Batson claim.

B. Prosecutorial Misconduct at Mahaffey's Sentencing Hearing

1. Facts

Mahaffey testified in his own behalf at his sentencing hearing. [**22] The prosecution's questioning of Mahaffey revealed that, while he was awaiting trial, he had participated in an armed escape from the Cook County jail and had been apprehended two days later. When asked whether he would attempt to escape again, Mahaffey replied, "I don't know."

During his closing argument, Mahaffey's counsel repeatedly requested the jury to resist imposing a death sentence so that Mahaffey could instead spend the rest of his life in prison.[8] Mahaffey's counsel posed this request to the jury on five occasions in his closing argument, making comments such as: "That is why I am here now, still pleading with you not to let Jerry free but to live the rest of his life in the penitentiary, not as a free man, as a prisoner, but still a man." In response, the prosecutor argued to the jury: When they tell you that they will spend the rest of their lives in prison, there is no guarantee. There is no guarantee, ladies and gentlemen, not only because of what the law may

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[8] Under Illinois law, a mandatory sentence of life imprisonment without the possibility of parole (or "natural life") was the only alternative to a death sentence in this case, because Mahaffey had been convicted of murdering two people. See 730 Ill. Comp. Stat. 5/5-8-1(a).

say but because of what you heard from the witness stand. The prosecutor further told the jury that, if it did not sentence the Mahaffey brothers to death, "You will be letting them go because [*681] you will be turning [**23] your back on the law and justice. They will be let go." Mahaffey requested that the trial judge instruct the jury that if it did not sentence him to death, the court was required by statute to sentence him to a term of life without parole. The court, however, refused to give this instruction.

2. Discussion

Mahaffey appears to make two related due process arguments in this context. We review these claims de novo, the standard of review that prevailed before the AEDPA became effective. See, e.g., *Abrams v. Barnett, 121 F.3d 1036, 1038 (7th Cir. 1997).* His first argument relies upon the prosecutor's comment that there was "no guarantee" that Mahaffey would spend the rest of his life in prison "not only because of what the law may say," [**24] along with his comment that, if the jury failed to impose the death penalty, Mahaffey "will be let go." Mahaffey contends that these statements implied that, by law, he could at some point in the future be released or paroled from prison. Relying on our opinion in *Del Vecchio v. Illinois Department of Corrections, 31 F.3d 1363, 1385 (7th Cir. 1994)* (en banc), cert. denied, *514 U.S. 1037, 131 L. Ed. 2d 290, 115 S. Ct. 1404 (1995),* he argues that this implication "raises the possible inference that there was a 'careless or designed pronouncement of sentence on a foundation [that was] extensively and materially false.'" Id. (quoting *Town-*

send v. Burke, 334 U.S. 736, 741, 92 L. Ed. 1690, 68 S. Ct. 1252 (1948)).

The prosecution's comment that "there is no guarantee . . . because of what the law may say," is subject to a number of differing interpretations. Both the Illinois Supreme Court and the district court below construed the prosecution's comment to refer to Mahaffey's previous escape from jail and his response that he did not know whether he would attempt to escape again. See *978 F. Supp. at 778; 539 N.E.2d at 1192.* Further, the district court stated that the "argument that anything [**25] less than the death penalty will be a letting go of defendant was nothing more or less than a comment that the death penalty was the only just and legally correct sentence." *978 F. Supp. at 778.* This is a reasonable interpretation of this disputed comment. Even if we were to disregard these reasonable interpretations of the prosecution's comments and accept those asserted by Mahaffey, as in Del Vecchio, "this would not be enough to overturn the death sentence." *31 F.3d at 1385.* The prosecution's contested statements were not "extensively and materially false," as the prosecution never explicitly stated that Mahaffey could be eligible under Illinois law for parole or release. See id. (quoting *Townsend, 334 U.S. at 741).* Further, in light of the evidence of Mahaffey's prior escape and his equivocal response at the sentencing hearing regarding future escape attempts, the jury already was aware of the risk that, at some point in the future, Mahaffey could be loosed upon the public. It is accordingly "questionable whether the jury relied on [the contested statements] in its 'pronouncement of sentence.'" See id. Because Mahaffey has not established that the challenged state-

ments were inaccuracies [**26] of "constitutional magnitude," see *United States v. Tucker, 404 U.S. 443, 447, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972),* we reject this formulation of his due process challenge.

Mahaffey's second related argument incorporates into the above analysis the fact that the trial court refused to allow him—either through argument or an instruction—to explain to the jury that the only alternative to a death sentence was a sentence of natural life. Mahaffey argues that the prosecution's implication that Mahaffey could ultimately be released from prison and pose a threat to society, combined with Mahaffey's inability to inform the jury of the only statutory alternative, served to deprive him of due process. This argument evokes the rule of *Simmons v. South Carolina, 512 U.S. 154, 129 L. Ed. 2d 133, 114 S. Ct. 2187 (1994).* Simmons held that when the prosecution argues to a capital defendant's sentencing jury that the defendant represents a future danger, the defendant must be permitted to inform the jury that he would not be eligible for parole, so long as the only statutory alternative to a death sentence is imprisonment without possibility of parole. See *id. at 169; id. at 177* [*682] (O'Connor, J., [**27] concurring in the judgment). Wisely, Mahaffey does not explicitly rely on Simmons in his briefs to this Court. That is because *O'Dell v. Netherland, 521 U.S. 151, 138 L. Ed. 2d 351, 117 S. Ct. 1969, 1977-78 (1997),* held that Simmons announced a new rule within the meaning of *Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989);* our Circuit had previously reached this same conclusion in *Stewart v. Lane, 60 F.3d 296, 299-303 (7th Cir. 1995),* cert. denied, *518 U.S. 1033 (1996).* The fact that Mahaffey does not ex-

plicitly rely on Simmons, however, does nothing to alter Teague's principle of the nonretroactivity of new rules. Mahaffey's conviction became final in 1990, when the Supreme Court denied certiorari on direct review. He therefore cannot benefit from the rule of Simmons, which the Court announced in 1994. Thus, we reject this variant of his due process claim as well.

C. Ineffective Assistance of Trial Counsel

Mahaffey argues that his trial counsel, Steven Decker, provided ineffective assistance in two ways. First, he argues that Decker failed to investigate and introduce evidence at a pretrial suppression hearing regarding Mahaffey's confession. Second, he argues that [**28] Decker failed to investigate and introduce potentially mitigating evidence at his sentencing hearing. To prevail on either of these claims, Mahaffey must satisfy the familiar standards of *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).* This test requires him to demonstrate both deficient performance by his trial counsel and prejudice as a result of the deficiency. See *id. at 694.*

In order to establish deficient performance, a defendant must demonstrate that he has been denied his Sixth Amendment right to a fair trial as the result of the incompetence of defense counsel. See, e.g., *Eddmonds v. Peters, 93 F.3d 1307, 1313 (7th Cir. 1996),* cert. denied, *117 S. Ct. 1441, 137 L. Ed. 2d 548 (1997).* "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, 466 U.S. at 687.* In this context, we do not

second-guess defense strategies that were sound or reasonable at the time of the trial simply because they ultimately proved unsuccessful. Rather, "counsel must contest the prosecution's case and advance a good defense; if that role has been fulfilled, a writ of habeas [**29] corpus should not issue." *Holman v. Gilmore, 126 F.3d 876, 882 (7th Cir. 1997)*, cert. denied, *118 S. Ct. 1169, 140 L. Ed. 2d 179 (1998)*.

To establish prejudice under Strickland, a defendant must satisfy a similarly high threshold. "[A] criminal defendant alleging prejudice must show 'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Lockhart v. Fretwell, 506 U.S. 364, 369, 122 L. Ed. 2d 180, 113 S. Ct. 838 (1993)* (quoting *Strickland, 466 U.S. at 687)*; see also *Eddmonds, 93 F.3d at 1313* ("Prejudice in the Strickland sense refers to 'unprofessional errors' so egregious 'that the trial was rendered unfair and the verdict rendered suspect.'") (quoting *Kimmelman v. Morrison, 477 U.S. 365, 374, 91 L. Ed. 2d 305, 106 S. Ct. 2574 (1986)*). In the context of ineffective assistance at the penalty phase of a capital case, we have noted that prejudice requires a showing "that a reasonable probability exists that, but for counsel's substandard performance, the sentencer 'would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Hall v. Washington, 106 F.3d 742, 749* (7th Cir.) (quoting *Strickland, [**30] 466 U.S. at 695)*, cert. denied, *139 L. Ed. 2d 190, 118 S. Ct. 264 (1997)*. Reviewing Mahaffey's claims de novo, we conclude that neither of them can satisfy the above standards.

1. Ineffective Assistance at the Suppression Hearing

Mahaffey raised two arguments at his pretrial suppression hearing. First, he argued that he did not understand the Miranda warnings that were given to him by the police, and therefore he did not knowingly and intelligently waive his right to counsel prior to confessing. Second, he argued that he was physically coerced into giving this [*683] confession because he was "brutalized" by the police. Mahaffey's wife corroborated his account. She stated that when police came to Mahaffey's apartment to arrest him she was ushered outside; while outside, she heard her husband screaming and the sounds of furniture being thrown around. In an attempt to explain away the confession's detailed recitation of the facts surrounding the Pueschels' murders, Mahaffey contended that police spoon-fed him the details of the crime over a period of two hours following his arrest. His twenty-page confession, Mahaffey testified, was the result of his memorizing information that had been [**31] provided to him by the police.

Mahaffey now argues that Decker, his trial counsel, provided ineffective assistance at the suppression hearing by failing to have Mahaffey examined by a clinical psychologist. Mahaffey's counsel at the state post-conviction stage did have Mahaffey examined by a psychologist, Dr. Harry Gunn, who concluded that Mahaffey was mildly retarded, could barely read, and most likely could not have understood his Miranda rights when they were given to him. Mahaffey asserts that there is a reasonable probability that his confession would have been suppressed if this testimony had been presented, and that the outcome of his trial would have been different if the statement had been suppressed.

Decker submitted responses to written interrogatories in connection with an evidentiary hearing conducted in the district court to address Mahaffey's ineffective assistance claims. In response to questions about the advisability of presenting evidence of mental retardation at the suppression hearing, Decker stated that he never "discerned anything whatsoever that [Mahaffey] was unable to read." Further, Decker thought that such evidence would be questionable "given [Mahaffey's] [**32] written statements and my other knowledge as to his abilities to understand and communicate." Decker's impression of Mahaffey's cognitive abilities is buttressed by the perception of others; Mahaffey's sister described him as someone who "presented himself as though he had all this knowledge." The district court judge, who observed Mahaffey and heard him testify at the evidentiary hearing held in connection with Mahaffey's ineffective assistance claims, also commented on the impression Mahaffey made: If the Jerry Mahaffey I saw in 1997 is like the Jerry Mahaffey that Steven Decker saw in the mid-1980s, then Decker is not to be faulted for failing to consider mental retardation. Prior to his arrest Mahaffey was employed full time, living with his family and reasonably capable of holding his own under examination. *978 F. Supp. at 770.* At the time of the suppression hearing, there was no reason to question Mahaffey's mental abilities, and we cannot say that Decker's failure to pursue such psychological evidence amounted to "gross incompetence."

In the context of Mahaffey's physical coercion argument, Mahaffey argues that Decker provided ineffective assistance by not interviewing and presenting [**33] the testimony of Mahaffey's neighbor, Charles Pat-

terson. Patterson would have testified that he heard screaming, thuds, and other similar sounds coming from Mahaffey's apartment at the time of the arrest that suggested that someone was being beaten. Opposing Mahaffey's physical coercion argument, the prosecution presented testimony of Mahaffey's arresting police officers, all of whom denied any instances of brutality. In addition, the two Assistant State's Attorneys who took Mahaffey's confession testified that Mahaffey had not complained of any brutality and that they saw no physical evidence of mistreatment during their contact with Mahaffey. The medical technician who prepared Mahaffey's intake report at the Cook County jail similarly noted that there was no evidence or complaints of physical brutality. Finally, the prosecution presented a photograph taken of Mahaffey at the time he gave his confession which, the district court below noted, contains "no sign of the substantial injury he claimed was inflicted by a blow to his nose." *978 F. Supp. at 776.*

The trial court considered this testimony, along with the testimony given by Mahaffey and his wife, and concluded that "the great [**34] weight of the evidence" refuted Mahaffey's [*684] claims of brutality and that "overwhelming evidence" refuted Mahaffey's Miranda violation claim. In this context, we do not believe that there is a reasonable probability that the result of the suppression hearing would have been different if Mahaffey's neighbor Charles Patterson had been called to testify. See, e.g., *Wright v. Gramley, 125 F.3d 1038, 1041 (7th Cir. 1997).* Although Patterson heard sounds coming from Mahaffey's apartment, he states that he never saw Mahaffey at the time of his arrest. The trial

judge found the testimony of the prosecution's witnesses credible, and it is unlikely that Patterson, without having seen physical evidence that Mahaffey was brutalized, would have altered the court's analysis. Thus, we conclude that Mahaffey is unable to demonstrate prejudice under Strickland for his trial counsel's failure to present Patterson's testimony.

2. Ineffective Assistance at the Sentencing Hearing

As mandated by the Constitution, see *Lockett v. Ohio, 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978),* the Illinois death penalty statute requires the sentencer to consider all mitigating factors relevant to imposition [**35] of a sentence of death. See Ill. Comp. Stat. 5/9-1(c). Accordingly, competent representation demands that defense counsel present an argument that focuses the attention of the jury on any mitigating factors. See, e.g., *Kubat v. Thieret, 867 F.2d 351, 369* (7th Cir.), cert. denied, 493 U.S. (1989). Like other strategic decisions, a defense counsel's reasonable choice to omit certain mitigating evidence in favor of alternative arguments does not render his assistance ineffective. See *id. at 368.* In the instant case, Mahaffey's trial counsel adopted a strategy of pleading for the jury's mercy at the sentencing hearing. As a general matter, we have recognized that "[a] simple plea for mercy may be a valid choice, if that plea focuses on the particular defendant and the circumstances of the particular offense." *Hall v. Washington, 106 F.3d 742, 750* (7th Cir.), cert. denied, *139 L. Ed. 2d 190, 118 S. Ct. 264 (1997);* see also *Eddmonds v. Peters, 93 F.3d 1307, 1322 (7th Cir. 1996),* cert. denied, *117 S. Ct. 1441, 137 L. Ed. 2d 548 (1997).*

The mitigation evidence presented at Mahaffey's sentencing hearing consisted of the testimony of three of his relatives—his wife, his mother, and his sister—as well as the [**36] testimony of Mahaffey himself. Mahaffey's mother related the difficult circumstances of her son's upbringing in a "rough" and "violent" neighborhood, and she told the jury of Mahaffey's loving relationship with his family. She further said that her son's death would affect her "very much . . . because I am a mother, and I love him deeply, and his presence would be missed." Mahaffey's wife testified similarly and told the jury of his close relationship with her and their children. Mahaffey testified and told the jury that his family would miss him if he were sentenced to death, and he discussed his desire to live: "I'm a human being. I have feelings. I have a heart. I desire to live." Mahaffey's counsel presented a coherent closing argument to the jury, discussing, among other things, the unplanned manner in which the Mahaffey brothers had arrived at the Pueschels' apartment and contrasting their crimes with a murder-for-hire. Decker also discussed the nature of punishment and argued that the jury should act mercifully and not be responsible for an individual's death. In addition, he focused the jury on the mitigation evidence that had been presented, stating that Mahaffey "has a family, [**37] he has a wife who loves him and children who depend on him, children who want him to remain alive in the penitentiary, a wife who wants him to remain alive in the penitentiary."

When considered in the context of the other available strategic alternatives, which we discuss infra, we do not believe that Decker's performance at sentencing fell

below the level of reasonable competence. This case is not like Hall, in which the defense counsel's closing argument to the sentencing judge "relied upon sweeping and largely irrelevant appeals to the judge's personal beliefs and religious principles." *106 F.3d at 750.* Here, Decker's presentation focused specifically on Mahaffey's situation and the impact that a sentence of death would have on Mahaffey's family. In addition, our holding [*685] in Hall was not based solely upon "counsel's failure in his closing argument to offer any reason other than blatant disregard of Illinois law for sparing Hall's life," *id. at 749,* a shortcoming which is not implicated in the instant case in any event. We also premised our holding in Hall upon the "total failure" of Hall's attorneys "to contact Hall in preparation for the sentencing hearing and their consequent [**38] failure to present his mitigation witnesses." Id. In this context, Mahaffey contends that Decker failed to prepare competently for the sentencing hearing, the issue to which we now turn.

Mahaffey argues that Decker provided ineffective assistance because he failed to obtain Mahaffey's school records and to investigate his mental health so that this evidence could be used in mitigation at the sentencing hearing. Decker's responses to the interrogatories posed by Mahaffey in connection with the evidentiary hearing stated that Decker was aware that Mahaffey "didn't have a stellar school record" and had only completed the eighth grade. This awareness, Mahaffey contends, should have compelled Decker to obtain the school records in the hope of learning more about Mahaffey's mental state. Mahaffey's post-conviction counsel obtained these school records, which indicated that Mahaffey had an IQ of 64 when he was

ten years old, was transferred to a special education school when he was in the sixth grade, and had serious difficulties reading and spelling. Mahaffey argues that the information contained in these records would have compelled Decker to conduct further investigation into his mental [**39] health. Cf. *Stewart v. Gramley, 74 F.3d 132, 135 (7th Cir.)* (recognizing that it constitutes ineffective assistance to fail to conduct further investigation into a defendant's mental status when it is apparent from readily available evidence that the defendant has "some mental or other condition that will repay further investigation"), cert. denied, *136 L. Ed. 2d 65, 117 S. Ct. 113 (1996).*

Further investigation, Mahaffey contends, would have included a psychological evaluation, such as the one ultimately conducted by Dr. Gunn, that would have revealed that Mahaffey is mentally retarded and suffers from "borderline personality disorder." Mahaffey argues that if this mitigating evidence had been introduced, there is a reasonable probability that at least one of the twelve jurors who sentenced him would have refused to impose a death sentence. See *Emerson v. Gramley, 91 F.3d 898, 907 (7th Cir. 1996),* cert. denied, *117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997).* He therefore asserts that Decker provided ineffective assistance in failing to unearth this evidence and present it to the jury. See *Hall, 106 F.3d at 749-50* ("Where it is apparent from evidence concerning the crime itself, from conversation with [**40] the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance.").

The Constitution requires defense counsel in a capital case to conduct a reasonable investigation into potential mitigating factors. See, e.g., *Strickland, 466 U.S. at 691; Stewart, 74 F.3d at 135.* A "reasonable investigation" does not mandate a "scorch-the-earth strategy," see *Hall, 106 F.3d at 749,* a requirement that would fail to consider the limited time and resources that defense lawyers have in preparing for a sentencing hearing. See *Stewart, 74 F.3d at 135.* Rather, the contours of a reasonable investigation are dictated by the circumstances of each case, including the facts of the crime, conversations with the defendant and others familiar with him, and other readily available sources of information, such as trial testimony. See, e.g., *Hall, 106 F.3d at 749-50; Stewart, 74 F.3d at 135.* While this evidence will in some cases indicate that further investigation would be beneficial, "in other cases, where these indications are lacking, counsel [**41] may 'reasonably surmise from his conversations with [the defendant] that character and psychological evidence would be of little help.'" Id. (quoting *Strickland, 466 U.S. at 698)* (alteration in original). In this context, we recently have noted that "it is reasonable for a lawyer to place a certain reliance on his client, so that if the client and his family and friends throw the lawyer off the scent, . . . the lawyer cannot be faulted for failing to go [*686] down the path thus closed off." *Thomas v. Gilmore, 144 F.3d 513, 515 (7th Cir. 1998).*

Mahaffey's argument can be interpreted as claiming ineffective assistance on two distinct bases. The first asks us to establish a per se rule that a capital defendant's lawyer must always obtain available institutional records, such as school records, that might give rise

to evidence of mitigating factors. We addressed this argument recently in Thomas, where the petitioner argued that his defense lawyer provided ineffective assistance by failing to subpoena his prison and school records and submit them to a psychiatrist for evaluation. Cognizant of the prevailing view that a determination of ineffectiveness typically depends on the circumstances [**42] of each case, see *id. at 516,* we recognized that such a per se rule would constitute a new rule within the meaning of *Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989).* Because we may not grant relief in habeas corpus proceedings on the basis of a new rule, see id., we declined to decide whether the failure to subpoena institutional records was per se ineffective. See *Thomas, 144 F.3d at 516.* The same considerations apply in the instant case, and we are unable to grant relief upon Mahaffey's contention that a defense counsel's failure to obtain school records necessarily renders his assistance incompetent. Although the State did not raise Teague, we may invoke its rule even when the State has waived it. See, e.g., *Thomas, 144 F.3d at 516; Winsett v. Washington, 130 F.3d 269, 274 (7th Cir. 1997).*

This leaves Mahaffey's contention that, given the circumstances of this particular case, Decker's failure to subpoena the school records fell below professional norms. In this context, Mahaffey relies upon the evidence that was apparent to Decker: Mahaffey "didn't have a stellar school record," he had only completed the eighth grade, and he contended that he was unable [**43] to understand his Miranda warnings (a contention that Decker advanced at the suppression hearing). Mahaffey argues that this evidence should have led

Decker to further investigate Mahaffey's mental state. See, e.g., *Hall, 106 F.3d at 749-50.* As part of the district court's hearing on Mahaffey's ineffectiveness claims, Decker responded to interrogatories regarding his preparation for the sentencing hearing. Decker stated that he asked both Mahaffey and his mother about Mahaffey's mental health history, and that both of them denied that Mahaffey had any mental problems.[9] More importantly, Decker's extensive conversations and contacts with Mahaffey led him to believe that investigation into Mahaffey's mental state was unwarranted. Decker testified that throughout the trial, he discussed strategy with Mahaffey and showed him police reports and documents, none of which Mahaffey had trouble understanding. Decker also considered Mahaffey's lengthy written confession, which Mahaffey had read and corrected. Based upon these factors, Decker stated that he had no indication that further investigation into Mahaffey's mental condition would have produced any mitigating evidence. This assessment [**44] of Mahaffey is consistent with that made by Mahaffey's own sister, who stated that "Jerry presented himself as though he had all this knowledge."

We must also consider in this context the factual findings of the district court judge, who had an opportunity

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[9] While the extent to which Decker prepared Mahaffey's mother for the sentencing hearing was disputed in the district court, the district judge credited Decker's testimony that he prepared Mahaffey's mother to testify. See *978 F. Supp. at 770.* We must defer to such findings of fact made by the district court unless they are clearly erroneous. See, e.g., *Griffin v. Camp, 40 F.3d 170, 172 (7th Cir. 1994).* In any event, Mahaffey does not challenge on appeal the truthfulness of this aspect of Decker's account.

to observe and listen to Mahaffey at the evidentiary hearing. As we have discussed, in assessing Mahaffey's testimony, the district judge found that "if the Jerry Mahaffey I saw in 1997 is like the Jerry Mahaffey that Steven Decker saw in the mid-1980s, [**45] then Decker is not to be faulted for failing to consider mental retardation." *978 F. Supp. at 770.* We must accept the district court's finding in this regard, as Mahaffey has presented us with no evidence to indicate that it is erroneous. As the district court found, "nothing in his client's demeanor [*687] or actions showed Steven Decker that his client had a mental condition that would mitigate sentence." *978 F. Supp. at 770.* These observations were corroborated by Decker's discussions with Mahaffey's family, which similarly gave Decker no reason to believe that further investigation would prove fruitful.

We therefore conclude that Decker engaged in a reasonable investigation into Mahaffey's mental state, as there was nothing apparent to indicate to Decker that further investigation was warranted. The mere fact of Mahaffey's poor scholastic record, which in many cases can be attributed to factors other than mental or psychological difficulties, is insufficient to require an all-out campaign to uncover mitigating psychological evidence. Decker did consider his first-hand impressions of Mahaffey, along with his conversations with Mahaffey's family members, and came upon a dead end. Cf. *Thomas, [**46] 144 F.3d at 515.*

In this way, this case is quite unlike the situation in either Hall, supra at 23, or *Eddmonds v. Peters, 93 F.3d 1307, 1323 (7th Cir. 1996),* cert. denied, *117 S. Ct. 1441, 137 L. Ed. 2d 548 (1997),* in which a majority of

the Court concluded that defense counsel performed incompetently by failing to investigate mitigating psychological evidence. In Eddmonds, there was a discovery file in the defense counsel's possession that contained substantial indications of mental illness, such that "even a cursory review of Eddmonds' file would have revealed long-standing, complex, and often severe mental problems." *Id. at 1324.* There is no comparable evidence of mental retardation or illness in this case. Thus, we are unable to characterize Decker's failure to uncover more evidence than he did as falling below the minimum standards of professional competence required by the Sixth Amendment. Because Mahaffey is unable to satisfy the first prong of *Strickland, see 466 U.S. at 694,* we reject this ineffective assistance claim.[10]

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[10] The district court, after finding that Decker had performed competently with respect to the sentencing hearing, nonetheless went on to consider whether Mahaffey could establish prejudice under *Strickland. See 978 F. Supp. at 771.* The court found that Mahaffey could not establish the required element of prejudice in any event. See *id. at 771-74.* Because we conclude that Decker's performance was not constitutionally deficient, we need not consider the prejudice element. See *Strickland, 466 U.S. at 697.* However, we note that, while we have in some cases held that a failure to obtain and present mitigating psychological evidence at sentencing was prejudicial, see, e.g., *Emerson v. Gramley, 91 F.3d 898, 907 (7th Cir. 1996),* cert. denied, *117 S. Ct. 1260, 137 L. Ed. 2d 339 (1997),* we have concluded in other cases that such a failure in performance was not prejudicial. See, e.g., *Thomas, 144 F.3d at 516-18; Eddmonds, 93 F.3d at 1319-22.* A determination of prejudice will depend on the facts of each case, along with the strength of the mitigation evidence that could have been introduced. Cf. *Thomas, 144 F.3d at 518.*

[**47] III.

Mahaffey has not established constitutional error with respect to either his conviction or sentence. We therefore affirm the judgment of the district court.

DISSENT BY: ROVNER

DISSENT: ROVNER, Circuit Judge, dissenting. In selecting the jury that would decide Jerry Mahaffey's fate—whether he was guilty of murdering Jo Ellen and Dean Pueschel, and whether he should be put to death for those murders—two prosecutors representing the State of Illinois exercised peremptory challenges to exclude the only seven African-American members of the jury venire. Mahaffey thus was convicted and ultimately sentenced to death by a jury comprised of eleven whites and one Asian-American. Fortunately for Mahaffey, the United States Supreme Court decided *Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986),* while his direct appeal to the Illinois Supreme Court was pending. That court thus remanded Mahaffey's case, ordering the trial court to conduct a hearing and to determine whether jury selection here complied with the constitutional mandate of the Batson decision. After conducting that hearing, the state trial judge concluded that Mahaffey had failed to establish a prima facie [**48] case of discrimination under Batson. The Illinois Supreme Court affirmed on that basis, and [*688] the federal district court subsequently declined to issue a writ of habeas corpus. In finding no Batson violation in the selection of Mahaffey's jury, both the state supreme court and the federal district

court effectively deferred to the trial court's conclusion that Mahaffey had failed to establish a prima facie case. See *People v. Mahaffey, 128 Ill. 2d 388, 539 N.E. 2d 1172, 1184-85, 132 Ill. Dec. 366 (Ill. 1989)*, cert. denied, *497 U.S. 1031 (1990); United States ex rel. Mahaffey v. Peters, 978 F. Supp. 762, 781-82 (N.D. Ill. 1997).*

Today's majority is understandably uncomfortable with that conclusion, however, for it essentially means that an inference of discrimination, and therefore a prima facie case under Batson, does not arise even where the State has exercised peremptory challenges against all seven African-American venire persons in a racially-sensitive double murder trial involving an African-American defendant and white victims. Acknowledging that Mahaffey has presented a "strong argument" on the prima facie case (ante at 12), the majority opts to bypass that aspect of the Batson [**49] inquiry and to proceed directly to the ultimate issue of discrimination. Such a course is appropriate, my colleagues believe, because at the Batson hearing ordered by the Illinois Supreme Court, the State came forward with its reasons for striking the seven African-American jurors, and the trial judge explicitly found those reasons valid and nonpretextual. Id. at 14. In my view, that conclusion simply is not supported by the record of the Batson hearing. It also is inconsistent with the decisions issued in this case by the Illinois Supreme Court, the federal district court, and the state trial judge who presided at the Batson hearing. The majority reaches such a conclusion, moreover, in the face of the State's own insistence that it has never articulated its reasons for striking the seven African-American jurors.

As I will demonstrate below, the majority's analysis of the Batson issue relies on a mistaken premise—that the actual reasons for the challenged strikes were before the state trial judge and that those reasons were considered and accepted by him. To the contrary, the record demonstrates that the State never offered its reasons for striking the African-American jurors, as [**50] the State itself concedes, and those reasons thus were never considered by the state trial judge or by any state or federal court that subsequently has reviewed his work. The Illinois courts and the prosecutors who have been so intimately involved in this case for so long simply are not mistaken as to what occurred at the Batson hearing. It is rather the majority of this court, almost eleven years later, that I believe misreads the record in order to avoid the obvious conclusion that a remand on the Batson issue is required.

In my view, and I venture to say in the view even of my colleagues in the majority, Jerry Mahaffey plainly established a prima facie case of discrimination at the Batson hearing in November 1987. And because a prima facie case was shown, the State must now be required to articulate to the district court its race-neutral reasons for striking all seven African-Americans from Mahaffey's jury. At that point, the district court must decide for the first time in the extended history of this case whether the reasons offered for the seven strikes are valid, or whether those reasons are instead a pretext for discrimination. Jerry Mahaffey is entitled to at least that much [**51] before the State of Illinois carries out his death sentence. The United States Constitution, as interpreted by the Supreme Court in Batson, requires no less. Because a majority of this court

is unwilling to give Mahaffey even that, I must respectfully dissent.

I.

The fundamental mistake I find in the majority's opinion is its suggestion that the prosecutors actually offered their reasons at the Batson hearing for striking the seven African-American jurors. They plainly did not, as is clear from every other court's discussion of the issue, and from the State's own brief in this appeal. See Respondent's Br. at 13 ("The prosecution never tendered 'race-neutral' reasons at trial, nor during any appellate proceeding, state or federal.").[1] [*689] What the State did offer at the Batson hearing, and what the

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[1] The Respondent's brief further emphasized the point as follows: The District Court itself made quite clear in its opinion, any explanations which had been given by the prosecution were "directed to explaining the pattern of challenges" used during the jury selection, rather than attempting to proffer raceneutral reasons to the court, which would have been premature due to petitioner's obvious failure to establish a prima facie case of discrimination. In fact, since the time of the original voir dire, the prosecutors have steadfastly refused to tender "race-neutral" explanations for their challenges until petitioner had demonstrated a prima facie case of discrimination. Even the Illinois Supreme Court found any "apparent explanations" for the State's challenges were "relevant circumstances which a trial court may consider when determining a prima facie case of discrimination." *Mahaffey, 539 N.E.2d at 1184.* Id. (additional citations omitted). Counsel for the State then reiterated the point at oral argument, assuring us that the prosecutors have never in the long history of this case offered their true reasons for striking the seven African-American jurors. In my view, the majority's explanation for the State's position simply does not comport with the record here. See ante at 10-11 n.7. [**54]

majority now misconstrues as the State's race-neutral reasons for the strikes, were possible explanations for the challenges that were apparent in the record of the voir dire proceeding itself. The State argued to the trial judge at the Batson hearing that such possible explanations, if apparent from the record, could be considered at the prima facie case stage even before the State was [**52] required to articulate its true reason for any individual strike. According to the State, those possible explanations were relevant to whether the trial judge should draw an inference of discrimination for purposes of the prima facie case. See Batson Hearing Tr. at 12 (prosecutor argues that "in determining whether or not the defendant has made out a prima facie case, the trial judge may consider any apparent reasons for the prosecutor's challenges against minority jurors.").[2] Yet those "apparent reasons" are to be distinguished from the State's actual reasons, which, as the State pointed out almost eleven years ago at the hearing and now confirms in its brief to this court, have never been revealed. See id. at 25 ("Since the defendants have not even made a prima facie case on this issue, there is no further need for any . . . inquiry into why we exercised

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[2] Later in the hearing, the prosecutor explained that: In certain cases the justifications for some of the State's peremptories will not be apparent from the transcript of jury selection. However, it has been held in such cases that the defendants did fail to make out a prima facie case of discrimination where the transcripts show that most but not all of the State's peremptory challenges were clearly justified by facts which were apparent in the record. Id. at 14-15. The State thus effectively argued at the Batson hearing that it was not required to reveal the true reasons for the strikes if possible explanations that were apparent from the record served to negate the existence of a prima facie case.

our challenges as we did."). Thus, when the prosecutor proceeded to address the characteristics of five of the seven African-American jurors individually, he was not purporting to reveal the State's true reasons for striking those jurors; he was instead offering "reasons which are apparent from the record which justify the State's [**53] challenges against these minority jurors." Id. at 20. In the State's own view, then, its prosecutor never crossed the line into the pretext stage, as the majority now finds, because the prosecutor focused his entire argument on the requirements of the prima facie case. Indeed, the prosecutor concluded his argument at the Batson hearing by requesting that the trial judge find no prima facie case in the circumstances here. Id. at 26.[3]

As the majority [**55] points out, in responding to the prosecutor's argument, Mahaffey's counsel intimated that the State may have done more than merely argue the absence of a prima facie case. Yet after suggesting that the prosecutor may have crossed the line into the explanation stage, defense counsel observed that "if this is done on the assumption that . . . a prima facie case [has] been presented, then I think that is a significant concession. Otherwise, much of what he said deserves review after your Honor has found [*690] a prima facie case." Id. at 26-27. Later in the hearing, defense coun-

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[3] In the district court, Judge Zagel took the same view of the prosecutor's arguments at the Batson hearing: "In this case, the prosecutors elected to dispute the showing of the prima facie case though they did explicitly deny basing challenges on race. The detailed explanation they did offer was directed to explaining the pattern of challenges." *Mahaffey, 978 F. Supp. at 781.*

sel reiterated that the issue before the court was whether a prima facie case had been shown, and counsel twice stated that if a prima facie case were found, Mahaffey would then address in more detail the possible explanations the prosecutor had offered. See id. at 28 ("As far as the specifics and the details, we will respond if your Honor finds a prima facie case.") & id. at 36 ("And we would wish to respond to each of those grounds if your Honor finds that there was a prima facie case.").[4] And counsel concluded his argument by asking the trial judge to find that Mahaffey had satisfied his burden under Batson of [**56] establishing a prima facie case of discrimination: The matter for your Honor at this time seems to be whether the fact that all Blacks were excluded by the State on peremptory challenge and there were no Blacks on the jury to try Black defendants, that we have at least established a prima facie case entitling us to a ruling by your Honor and an evaluation and consideration on the grounds and a decision. . . . So we would ask your

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[4] According to my colleagues in the majority, Mahaffey's counsel "argued that at least some of the prosecution's asserted justifications were pretextual." Ante at 8. With the utmost respect, however, I again must disagree. It is clear from the transcript that defense counsel, like the prosecutor, argued only what the existing record revealed about the stricken jurors. Defense counsel asserted that the possible explanations pointed out by the prosecutor did not negate the existence of a prima facie case because white jurors with similar characteristics and opinions had been permitted to remain on the jury while African-American jurors with those characteristics and opinions had been excluded. Id. at 29-36. As I noted in the text, moreover, counsel twice told the trial judge that he would respond further on the pretext question if a prima facie case were found.

Honor at this time to conclude there has been a showing of a prima facie case and therefore the State must demonstrate there has been neutral grounds for removing the jurors. Id. at 36.

[**57] Having heard the arguments of both sides on the issue of the prima facie case, the state trial judge proceeded to address that issue alone. The court thus made no mention of defense counsel's request that he be given the opportunity to respond in more detail to any race-neutral reasons offered by the State if a prima facie case were found. Judge Hett began his analysis by reciting the elements of a prima facie case under Batson, making it abundantly clear that he was considering only that aspect of the Batson equation. As the majority points out, Judge Hett then provided detailed observations on the jury voir dire, which led him to conclude that "similar types of people were also on the jury. . . . All of the people who were excused were similar to the people who were chosen. The Whites who were excused were similar to the Blacks who were excused." Id. at 51. Contrary to my colleagues' assertion, however, Judge Hett never suggested that the prosecutor had offered the State's race-neutral reasons for the strikes, nor did he ever indicate that he was assessing whether those reasons were a pretext for discrimination. Cf. ante at 14 ("Judge Hett considered in detail the prosecution's [**58] race-neutral justifications, conducted his own analysis regarding whether any of these justifications were pretextual, and concluded that Mahaffey had not shown racial discrimination."). Rather, the judge concluded from the pattern of strikes and the information revealed by the record of the jury voir dire that an inference of discrimination

should not be drawn in these circumstances: Looking at the totality of the circumstances I do not believe that there has been a showing, a prima facie showing that the State exercised [its] challenges in a manner that showed racial discrimination. They treated both the Blacks and the Whites who were being excused in the same way. It is apparent in the record they used the same factors that I found as to Whites, again as to Blacks. Batson Hearing Tr. at 54. Judge Hett therefore concluded that Mahaffey had failed to carry his burden of establishing a prima facie case under Batson. Id. at 55.

On appeal, the Illinois Supreme Court affirmed Judge Hett's conclusion regarding the absence of a prima facie case, and nowhere did that court suggest, as my colleagues now [*691] conclude, that the trial judge had made a finding on the ultimate issue of discrimination. [**59] In fact, the state supreme court expressly rejected Mahaffey's assertion that the trial judge had erred when he relied on the "apparent explanations" for the strikes offered by the State at the prima facie case stage. In so doing, Illinois' highest court read the record of the Batson hearing much differently than my colleagues do today. The Illinois Supreme Court said that "rather than relying on 'apparent explanations' for the State's challenges, the trial court merely reviewed the characteristics of the stricken jurors to determine their heterogeneity. This is a relevant circumstance which a trial court may consider when determining a prima facie case of discrimination." *People v. Mahaffey, 539 N.E.2d at 1184* (citing *People v. Evans, 125 Ill. 2d 50, 530 N.E.2d 1360, 1365, 125 Ill. Dec. 790 (Ill. 1988),* cert. denied, *490 U.S. 1113 (Ill. 1989)).* The Illinois Su-

preme Court thus considered and rejected the very premise of today's majority opinion—that the State had crossed the line at the prima facie case stage by offering its race-neutral explanations for the strikes, and that the trial judge had found those explanations valid and nonpretextual. See ante at 14.

In articulating a contrary [**60] view, my colleagues inform us that the state trial judge's finding on the ultimate issue of discrimination is entitled to a presumption of correctness (ante at 13-14), which is certainly true had such an ultimate finding actually been made. As I have explained, however, no such finding ever was made by the Illinois courts in this case.[5] I therefore find it more than a bit ironic that the major-

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[5] Because no such finding was made here, this case cannot be likened to *Hernandez v. New York, 500 U.S. 352, 359, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991)*, where a plurality of the Supreme Court found the prima facie case issue moot once the prosecutor had offered his race-neutral reasons for juror challenges. Cf. ante at 11-12. In that case, the prosecutor immediately volunteered his race-neutral reasons for striking two prospective jurors after a Batson objection was raised. *Hernandez, 500 U.S. at 356.* Indeed, the prosecutor specifically stated that he had excused the two Hispanic jurors because he was uncertain that they would accept the official interpreter's translation of testimony that would be given in Spanish. Id. There was thus no doubt in Hernandez that the prosecutor had offered his race-neutral explanations, and every court to consider the case recognized that he had done so. *Id. at 358.* My two colleagues in the majority here, by contrast, are the only two judges in the extended history of this case who have concluded that race-neutral explanations were provided and that a finding was made on the ultimate issue of discrimination. Hernandez, in short, does not support the majority's decision to bypass Batson's prima facie case stage in the circumstances here.

ity would invoke such a presumption here, where it essentially finds that the Illinois courts were themselves confused about which aspect of the three-part Batson equation they actually were dealing with. How can the federal courts possibly afford a presumption of correctness to a state court finding that the state courts themselves did not purport to make? As I read the record, the state courts only found that Mahaffey had failed to make out a prima facie case of discrimination, and I do not think we are at liberty almost eleven years later to recast the issue simply because we may find the state courts' conclusion indefensible on this record. [**61]

II.

Having demonstrated that the only issue decided by the Illinois courts, and therefore the only issue properly before us today, was whether Mahaffey established a prima facie case of discrimination, I must conclude that he did. Unlike the ultimate issue of discriminatory intent, which as a factual question is entitled to deferential review (see *Batson, 476 U.S. at 98 n.21),* the preliminary question of whether a prima facie case has been shown presents a mixed question of law and fact (see, e.g., *United States v. Bergodere, 40 F.3d 512, 516 (1st Cir. 1994),* cert. denied, *514 U.S. 1055, 131 L. Ed. 2d 318, 115 S. Ct. 1439 (1995); United States v. Alvarado, 891 F.2d 439, 443 (2d Cir. 1989),* vacated on other grounds, *497 U.S. 543 (1990)),* which I submit the appellate courts should review de novo. Although some of our sister circuits have utilized a clearly erroneous standard in their review of that question (see *Bergo-*

dere, 40 F.3d at 516 (citing cases)), I believe that the Supreme Court's recent decision [*692] in *Ornelas v. United States, 517 U.S. 690, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (1996),* points in the direction of de novo review. The question of whether an inference of discrimination [**62] may be drawn from a set of undisputed facts relating to the racial makeup of the jury venire and the prosecutor's exercise of peremptory challenges is, like the probable cause question before the Court in Ornelas, one over which the appellate courts should exercise a degree of control that a clear error standard would not afford. *Id. at 697.* As in Ornelas, factual scenarios will recur in this context, and de novo review would allow for a measure of consistency in the treatment of similar factual settings, rather than permitting different trial judges to reach inconsistent conclusions about the prima facie case on the same or similar facts. *Id. at 697-98;* cf. *Mahaffey, 978 F. Supp. at 781* ("This is not to say that Judge Hett could not have decided the question the other way, but on this record, given his participation in the jury selection, his judgment that there was no prima facie case was permissible."). Ultimately, however, I find the standard of review question largely beside the point, for even if a more deferential standard were applied, I would have to conclude that Judge Hett clearly erred in finding that no inference of discrimination would arise from the facts and circumstances [**63] here.

I recognize, of course, that Batson requires that we look to all the relevant facts and circumstances in assessing whether an inference of discrimination should arise. See *Batson, 476 U.S. at 96.* Yet by far the most important factor in this case, and one that I believe the

Illinois courts were too quick to overlook, is that all seven African-American members of the jury venire were excused by the State, meaning that not a single member of Mahaffey's own race was seated on the jury that decided his fate.[6] This is therefore not a case in which only one or two members of a particular racial group were excused while other members of the same racial group remained; it is instead a case where the State exercised seven of thirteen total challenges to exclude every member of Mahaffey's own race. That strikes me as fairly compelling evidence of discrimination, at least at the prima facie case stage, where the State has not yet been required to articulate its race-neutral reasons for striking the African-American jurors. An inference of discrimination is particularly appropriate, I believe, in light of the Supreme Court's admonition in Batson that we be mindful of the fact that "peremptory [**64] challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" *476 U.S. at 96* (quoting *Avery v. Georgia, 345 U.S. 559, 562, 97 L. Ed. 1244, 73 S. Ct. 891 (1953)).* The Supreme Court in Batson emphasized that an inference of discrimination may arise where the prosecutor makes a pattern of strikes against African-American jurors. *476 U.S. at 97.* I submit that such a pattern plainly is evident in the State's juror challenges here, where the prosecutor excused each and every African-American member of the jury venire. See *McCain v. Gramley, 96 F.3d 288,*

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[6] There was of course an African-American alternate who sat through Mahaffey's trial, but she did not deliberate on the verdicts either at the conviction or penalty phase.

292 (7th Cir. 1996) (inference of discrimination may be drawn "where there are only a few members of a racial group on the venire panel and one party strikes each one of them"), cert. denied, *137 L. Ed. 2d 482, 117 S. Ct. 1320 (1997); United States v. Sowa, 34 F.3d 447, 452 (7th Cir. 1994)* ("The government easily made its prima facie case that the peremptory challenges were motivated by race; each and every black venireperson [six in all] was challenged."), cert. denied, *513 U.S. 1117, 130 L. Ed. 2d 796, 115 S. Ct. 915 (1995); Splunge v. Clark, 960 F.2d 705, 707 (7th Cir. 1992)* (prima [**65] facie case shown where both African-American members of the jury venire were excluded by the prosecution).

And lest we forget, the crimes at issue in this case were obviously racially-sensitive—Mahaffey, a young African-American male from Chicago's South side, was charged with murdering a white couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond [*693] to Mahaffey's defense at trial, as well as to his arguments in mitigation at the capital sentencing phase. See *Williams v. Chrans, 945 F.2d 926, 943-45 (7th Cir. 1991)*, cert. denied, *505 U.S. 1208, 120 L. Ed. 2d 877, 112 S. Ct. 3002 (1992)*. Before the judgment of the essentially all white jury in this case is executed, I believe that the State at least [**66] should be required to explain why it excused each venire person of Mahaffey's own race.

I am sensitive to the fact that Judge Hett was present during the jury voir dire and that, in his view, all of the relevant facts and circumstances did not produce

an inference of discrimination. Yet Judge Hett came to that conclusion only after comparing the seven African-Americans whom the State excused from the jury with the six whites who were similarly excused. The state trial judge essentially found that because the excused African-Americans and the excused whites had similar characteristics, an inference of discrimination should not be drawn from the decision to strike the African-Americans. Batson Hearing Tr. at 54. But rather than comparing the excused African-Americans to the excused whites, I think the trial judge should have been comparing the excused African-Americans to the whites who remained, for only through such a comparison could the judge assess whether race played any role in the State's challenges. If an excused African-American juror had characteristics and opinions that were similar to those of a white juror who sat, for example, then the obvious inference, at least prior [**67] to the articulation of a race-neutral explanation for the strike, would be that the strike was racially motivated. As far as the voir dire record would reveal, the stricken juror's race would be the only characteristic distinguishing the African-American from the white who was retained. I find it significant in that regard that Judge Hett found at the Batson hearing that the whites who sat on Mahaffey's jury were similar to the African-Americans the State had excused. Id. at 51. That finding indicates to me that the African-Americans on the jury venire may have been singled out, as they may have been treated differently than whites with the same or similar characteristics. And the inference of discrimination that would arise in that circumstance is unaffected by the fact that some whites with the same characteristics also

may have been excused—the State still struck all the African-Americans while retaining some of the whites, and despite having strikes available that went unused.

In short, I believe that the showing made by Mahaffey at the Batson hearing was sufficient as a matter of law to require the State to come forward with race-neutral explanations for each of the challenged [**68] strikes. We should therefore remand this case to the district court to enable the State to do so now.

III.

The crimes of which Jerry Mahaffey stands convicted are indeed horrific, and the evidence certainly supports the jury's conclusion that Mahaffey was a perpetrator of those crimes. I have no doubt, moreover, that an Illinois jury could conclude, as this jury did, that Mahaffey deserved the death penalty as a consequence. But how I wish I were confident that the jury making those decisions had been selected in a constitutional manner. I simply cannot be confident on this record.

The State of Illinois should once and for all be required to articulate its true reason for striking each of the seven African-American venire persons from the jury that ultimately rendered those judgments. As the State itself concedes, it has never done so in the extended history of this case, nor has any court ever assessed the legitimacy of those reasons under the dictates of Batson. The majority's conclusions to the contrary, as I believe I have demonstrated, are without support in the state court record.

For all of these reasons, I most respectfully dissent.

APPENDIX D

JERRY MAHAFFEY, Petitioner-Appellant, v. THOMAS PAGE, Warden, Defendant-Appellee.

No. 97-4137

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

160 F.3d 1139; 1998 U.S. App. LEXIS 28201

October 26, 1998, Decided

PRIOR HISTORY: [*1]

Appeal from the United States District Court for the Northern District of Illinois, Eastern Div. No. 95 C 6623. James B. Zagel, Judge.

Original Opinion of August 6, 1998, Reported at: *1998 U.S. App. LEXIS 18189.*

JUDGES: Before Hon. WALTER J. CUMMINGS, Circuit Judge, Hon. JOEL M. FLAUM, Circuit Judge, Hon. ILANA DIAMOND ROVNER, Circuit Judge.

OPINION: ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed by petitioner-appellant on August 27, 1998, and the answer of respondent-appellee, all of the members of the original panel have voted to grant the petition for rehearing. Accordingly, the petition for rehearing is granted, and the panel will take the case under advisement on the briefs and the record.

APPENDIX E

UNITED STATES OF AMERICA ex rel.
JERRY MAHAFFEY, Plaintiff, v.
HOWARD PETERS, III, Defendant.

No. 95 C 6623

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF ILLINOIS, EASTERN DIVISION

978 F. Supp. 762; 1997 U.S. Dist. LEXIS 13597

September 5, 1997, Docketed

DISPOSITION: [**1] Petition for Writ of Habeas Corpus denied.

CORE TERMS: juror, prosecutor, brother, death penalty, psychological, sentencing, defense counsel, mitigation, psychologist, confession, sentence, boy, prima facie case, peremptory, guilt, woman, gun, mental condition, mitigate, prison, mental retardation, arrest, killers, hit, jury selection, conversation, impression, interview, brutality, retarded

COUNSEL: For JERRY MAHAFFEY, plaintiff: Alan Michael Freedman, Freedman & Bornstein, Chicago, IL.

For JERRY MAHAFFEY, plaintiff: Gary O. Prichard, United States Environmental Protection Agency, Chicago, IL.

For HOWARD PETERS, III, defendant: Arleen C. Anderson, Illinois Attorney General's Office, Chicago, IL.

For HOWARD PETERS, III, defendant: Sally Louise Dilgart, Judy L. Deangelis, Renee Goldfarb, Cook County State's Attorney, Chicago, IL.

JUDGES: James B. Zagel, United States District Judge.

OPINION BY: James B. Zagel

OPINION: [*764] MEMORANDUM OPINION AND ORDER

Jerry Mahaffey and his brother, Reginald invaded the Pueschel home, murdered a husband and a wife and tried hard to murder their eleven-year-old son. This was found by a jury which also decided that he deserved to die for what he had done, and he was sentenced to death. After unsuccessful challenges to the sentence in state court, he seeks to overturn the judgment in federal court. With neither fact nor law to justify his federal claims, he cannot prevail. I deny his petition for a writ of habeas corpus and allow the law to proceed on its stern course.

The crimes were discovered [**2] by the father of Jo Ellen Pueschel who found her dead body and that of her husband, Dean Pueschel in their home. He first found his severely beaten grandson, Richard wandering near the alley by the home. The eleven-year-old Richard swore that in the night he awoke to find himself in a headlock, being told by two separate voices to "shut up and be cool." He could not remember whether he fell asleep or was knocked out, but he did later wake and, in a daze, walked into his kitchen, where he was told to stay on the floor next to his mother. He did so, and saw his mother being struck.

Missing from the home were a video recorder, videotapes, an Atari game console, seven game cartridges, several items of the Pueschel's jewelry, along with a .357 magnum revolver and a shot gun. Pueschel's red Camaro was missing as well.

The Pueschel's Camaro was recovered on August 30, 1983 in a parking lot at 2245 West Lake Street in the Henry Horner projects.

[*765] On September 2, Jerry Mahaffey's brother, Cedric apparently made contact with the police and made statements which led to the arrest of Jerry and Reginald Mahaffey and the recovery from Jerry's residence of the video recorder, the Atari game and [**3] cartridges. In Reginald's residence was found the .357 revolver and 24 pieces of jewelry. At arrest, Reginald was wearing Dean Pueschel's ring and carrying his watch.

Both defendants confessed to an Assistant State's Attorney, and both confessions were read in full to the jury. Reginald's confession was ultimately admissible against Jerry Mahaffey because Reginald testified on his own behalf.

Jerry Mahaffey told the prosecutor that he and Reginald had discussed committing a burglary on the north side and drove to a clothing store at Howard Street and Western Avenue. Jerry saw a "paddy wagon" in an alley, so Reginald drove around the block and parked in a lot. After deciding not to burglarize the store, they were unable to restart their van. They walked away from it and saw an open window leading into a bathroom. They climbed through the window into the bathroom. They went into the "grown-ups' room" and the

"boy's room" and then to the kitchen where Reginald picked up a knife. Jerry wiped everything Reginald touched "for not finding fingerprints." They went to the boy's room, and Jerry tried to strangle him with a towel, then they put a pillow over his head, and Reginald strangled [**4] him four to five times. The boy kept struggling, and Jerry hit him on the head with a baseball bat he found in the room.

The brothers Mahaffey each took a bat from the boy's room, went to the other room and proceeded to hit the man on the head with the bats. Reginald took the woman to the living room where he raped her and forced fellatio. Jerry went into the room where the woman was present but returned to the man's room where the man was pulling a pistol out. Jerry hit the man with the baseball bat and then returned to the living room. Reginald asked the woman where there were other guns, and she told them. They went to get them, two could not be removed from a locked rack, but Reginald did get a shotgun. The man started moving again, so Reginald stabbed him four or five times in the chest and the side.

Reginald asked the woman for the keys to the car and took her with him to the car so she could disarm the alarm. He took her back to the house, and Jerry loaded their stolen goods in the car. During his statement, Jerry Mahaffey identified as the stolen items those things recovered from his and his brother's residences.

After loading up the car, Jerry went back to the house and [**5] told the woman to lie down. The boy was now with her saying, "Ma, Ma, Ma, Ma." Reginald struck her on the head several times with the pistol which blows killed her.

The brothers then drove the car to Reginald's house where they left their stolen goods. After this, they abandoned the car in the Henry Homer projects.[1]

[**6] No prints of either of the brothers were found at the crime scene. There was physical evidence of intercourse, but no sign of vaginal trauma. The sperm was untypable.

The survivor of this offense could not remember what else happened, but in court he identified (at a 99% level of certainty) Jerry Mahaffey and Reginald Mahaffey as the two men in his home that night of August 28-29, 1983. Richard Pueschel conceded that he had been unable to identify either Mahaffey in a lineup conducted when he was being hospitalized for his wounds. He denied having seen photos of the Mahaffeys in the [*766] papers. He said he had only described the assailants, one as 5'10" or 5'11", 160 to 180 pounds, medium Afro, possibly scarred on his left cheek, and the other as 5'9" or 5'10", 150 to 170 pounds, skinny, short Afro and short moustache. An investigating detective had a different description in his reports and

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[1] Reginald Mahaffey's statement was not dissimilar. The differences were (a) Jerry said the clothing store burglary was abandoned because of the police vehicle—Reginald said it was because of the traffic; (b) Jerry said he wiped Reginald's prints, an act unmentioned by Reginald; (c) Jerry said the woman performed fellatio on Reginald, Reginald said it was Jerry who was fellated; (d) Jerry said Reginald stabbed the boy, Reginald said Jerry stabbed the boy; (e) Jerry said Reginald stabbed the man, an act unmentioned by Reginald; (f) Jerry said Reginald hit the woman over the head with the revolver, Reginald said that, as he left the house, he could hear "solid hits" which "told him [Jerry] was finishing the lady and her son off with the bats."

said his description was based on a canvass of residents in the Pueschel's apartment building. The description said one assailant was 25-30 years of age, 6'2", 210 pounds, scraggly beard, white shirt, black male, and the other assailant was 25-30 years of age, 5'4"-5'6", 125 pounds, dark clothing [**7] and a light-complected black or Latino.

The brothers Mahaffey were tried jointly. At trial, Jerry Mahaffey defended on grounds of coercion of the confession and the reasonable doubt arising from the absence of physical evidence and any identification other than that of the young, injured boy.

Reginald Mahaffey took the witness stand, denied his guilt, denied that any stolen property had been removed from his home, but then stated that he had purchased the stolen property from a man who visited his apartment shortly before the arrest. He also offered the theory that the real culprit was Cedric Mahaffey.

The police did not arrest Cedric Mahaffey despite his knowledge of unpublished details of the crimes and the fact that he was a light-complected black. Cedric Mahaffey's prints were never compared to the ones found at the crime scene.[2]

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[2] Ruling that Reginald Mahaffey's counsel had opened the door to an inquiry about what Cedric Mahaffey said to the police, the jury (after being instructed that the evidence was admissible only against Reginald Mahaffey) heard that Cedric Mahaffey told officers he knew who committed the murders, but would not say until he could be sure of their involvement. He asked if a gun was taken, and when told the answer was yes, Cedric Mahaffey correctly described the guns and agreed to tell the officers where the killers lived. He also produced a

(continued...)

[**8] The jury convicted both men of all charges except that it acquitted Reginald of deviate sexual assault.[3] At the sentencing hearing, members of Jerry Mahaffey's family testified, and so did Mahaffey who denied committing the crime. His counsel argued that prison was so bad that life in prison was enough punishment, that no one should be executed and that the crime was not planned in advance. The jury thought the death sentence was called for under Illinois law, and the trial judge decided to sentence Jerry Mahaffey to death.

This habeas corpus proceeding presents an attack on the conviction and on the death penalty. The principal theme is a customary one of incompetency of counsel

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[2] (...continued)
videotape he said was taken from the victims' home. He acquired the tape when a "friend" called him on September 1 to help "move some stuff." With his friend and another person, he helped move video equipment and cassettes, and he saw the .357 magnum and a 12-gauge shotgun. During the move, the friend said that he and the other person had gotten items during a burglary where they "killed a couple of people on the north side and a little boy lived." Finally, Cedric Mahaffey told the police the two persons were his brothers, Jerry and Reginald. One of the brothers told him they had gone to commit a burglary, and their van broke down. They left it, crawled through an open window, found a boy asleep and beat him. They found the man and woman, beat them, had sex with the woman, took property, and loaded it into the car that was in the driveway. Cedric Mahaffey told the police where the various items of property could be found.

[3] The jury decided charges of murder (intentional, knowing and various forms of felony murder) of the parents, attempted murder and various forms of aggravated battery on the son. There were also charges of rape, deviate sexual assault (as to Reginald) and finally home invasion.

but some trial errors are raised as well and these [**9] involve some matters to which defense counsel did object at trial.

The defendant's arguments here are ably drafted, but they fail primarily because they are based on a misreading of the law, a misreading of trial counsel's position and the defense of it he was first asked to make several years after the trial and a misreading of the trial record. The principal arguments depend on a narrow focus on specific details combined with a relentless ignoring of the factual context of the case as a whole.

The recitation of the prior legal challenges to conviction and sentence may be tedious but what has gone before counts in habeas corpus law.

[*767] On automatic appeal, defendant raised the claims of (i) racially discriminatory jury selection, (ii) improper exclusion of one juror for her death penalty views, (iii) failing to notify defense counsel that the young boy who survived the attack had told prosecutors he could identify the killers in open court, (iv) wrongly refusing to grant a mistrial or a new sentencing jury after the mother of Jo Ellen Pueschel rose during trial to ask Reginald Mahaffey if he killed her daughter, (v) improperly admitting a medical record to prove the absence of coercion [**10] leading to a confession, (vi) failure to prove the corpus delicti, (vii) improperly conducting a joint death penalty hearing, (viii) improper closing arguments which undermined the presumption of innocence, appealed to fear, misstated the law and minimized the jury's sense of responsibility, (ix) the failure to prove one aggravation factor, (x) the refusal to instruct the jury that the alternative to death was

natural life imprisonment, (xi) excessiveness of the death penalty, (xii) the absence of enough information for an adequate appellate review of the sentence, and (xiii) various flaws in death penalty procedures in Illinois, to wit, prosecutorial discretion, the absence of a burden to disprove mitigating circumstances, the inability to rely purely on sympathy and mercy and that blacks are more likely than whites to receive the death penalty.[4]

[**11] In the state post-conviction proceeding, defendant raised a constitutional claim based on the failure of the Illinois Supreme Court to apply its decision in *People v. Gacho 122 Ill. 2d 221, 522 N.E.2d 1146, 119 Ill. Dec. 287* to Mahaffey's case, another based on the failure to preserve the right of individualized sentencing, an argument that the allocation of peremptory challenges was wrong and an argument based on the issues resolved now in *Free v. Peters, 12 F.3d 700 (7th Cir. 1993).* There was a lengthy attack on the competency of counsel. This argument was that counsel had a conflict of interest because it was his partner who defended Reginald Mahaffey, and that counsel failed to interview witnesses, investigate mental disability shortcomings for mitigation and evidence suppression purposes, or give a coherent closing argument. He was also said to have committed errors which cumulatively made his defense incompetent. Apparently it was, around this

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[4] In the case on direct appeal the Illinois Supreme Court reversed Reginald Mahaffey's conviction deciding that his case ought to have been severed in light of Jerry Mahaffey's confession. On retrial he was again convicted and sentenced to death. *People v. Mahaffey, 166 Ill. 2d 1, 651 N.E.2d 1055, 209 Ill. Dec. 607 (1995).*

time, that Mahaffey's post-conviction counsel tried to discuss the case with trial counsel. A letter dated Dec. 5, 1991 asked trial counsel to submit to an interview regarding his thought processes at the 1985 trial. He apparently refused to do so, and the state court refused to [**12] order a deposition.

This habeas petition rehearses the post-conviction arguments. I address each of them in turn, but first I will state the context in which Steven Decker, the defense counsel, had to make his decisions.

The crime itself was both heinous and heartless. No one here disputes this now and the Mahaffeys did not dispute it then.

What the jury heard here, what any jury would have heard, was the tale of a grandfather who, along with his wife, became concerned at the failure of his grandson, Richard to arrive so they could babysit for him. After phoning the boy's home and the parents' workplaces to no avail, he drove to the Pueschel house and found his eleven year-old grandson wandering, blood covered and beaten, outside the family home. Richard told him that "mom and dad are dead". The grandfather went in and saw the horrific scene for himself as did the jury by means of photography. While the grandfather and Richard waited for the ambulance, all the traumatized young boy wanted at that moment of his life was to have his grandfather open a soft drink for him. The grandfather was unable to do so that morning. This was a very powerful image of victimization, it is striking [**13] even in the dry text of transcript.

The killers entered the house the night before and slew the father by battering him with a baseball bat

and stabbing him many times. The mother was battered to death too. The boy was severely battered and [*768] stabbed. The killers stole jewelry, guns, a video recorder, a video game, video cassettes, and game cartridges.

The defendant, Jerry Mahaffey and his brother were both identified by Richard as the killers, and Jerry Mahaffey and his brother both confessed to being the killers, and in Jerry Mahaffey's case the confession of his brother was admissible against him.

By the time the jury set out to decide the penalty, it had found that Jerry and Reginald Mahaffey were the killers and it knew all of the details of the crime. The brothers entered the Pueschel home because their original intent to burglarize a store could not be carried out. Jerry Mahaffey systematically erased fingerprints, tried to strangle Richard with a towel and hit him in the head with a baseball bat. Jerry Mahaffey hit the father several times with a baseball bat. He also stood by (at the very least) while his brother criminally sexually assaulted the mother and stabbed the father [**14] and then battered the mother to death with a handgun. He helped steal their property and drove off in their car which he wanted to burn. He kept some of the stolen goods in his apartment. To devise a defense strategy counsel had to operate within the constraints presented by the facts found against his client and the constraints presented by his client's response to the charges.

Mahaffey begins his efforts here with an attack on the competency of counsel at sentencing, an attack unsuccessfully made in the Supreme Court of Illinois.

The standards by which counsel's competency is judged are well known since *Strickland v. Washington,*

466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Their application to capital sentencing cases requires defense counsel to "make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors." *Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989).* What this means in practice is not very well known, although in the following cases counsel was deemed ineffective. In Kubat, no evidence in mitigation was presented [**15] and the closing argument was neither logical nor coherent and presented the jury with a coda that served to aggravate rather than mitigate. In *Hall v. Washington, 106 F.3d 742 (7th Cir. 1997),* defense counsel did virtually nothing to investigate mitigation and offered a diatribe against the death penalty as his sole argument for mercy. In *Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991),* defense counsel had knowledge of Brewer's psychiatric problems and refused to use it despite the absence of any other mitigating theory and the fact that it might have supported his client's version that he played a lesser role in the offense. See also *Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996)* (no effort by counsel).

In *Stewart v. Gramley, 74 F.3d 132 (7th Cir. 1996),* counsel was competent who called witnesses to establish Stewart's difficult early life but failed to introduce other evidence of severe problems in Stewart's upbringing—this was so because counsel's conversations with Stewart turned up nothing remarkable in his personal history.

The summary of the rule in Hall v. Washington is simple. A decision not to present evidence "can ration-

ally be made . . . only after [**16] some inquiry or investigation by defense counsel. . . . This does not mean that only a scorch-the-earth strategy will suffice . . . But it does mean that the attorney must look into readily available sources of evidence. Where it is apparent from evidence concerning the crime itself, from conversation with the defendant, or from other readily available sources of information, that the defendant has some mental or other condition that would likely qualify as a mitigating factor, the failure to investigate will be ineffective assistance." *106 F.3d at 749-50.*

In this case, it is the mental condition and the psychological makeup of the defendant which is at the heart of this aspect of the habeas corpus challenge.

What Steven Decker did not do is have Jerry Mahaffey examined by a psychiatrist, nor did he review Mahaffey's grammar school records or speak to more of Mahaffey's family members. If he had done so, it is now said, he would have learned that Mahaffey is mentally retarded, has a psychological [*769] disorder, witnessed violence at an early age, and on occasions helped his youngest sister and the elderly.

What Steven Decker did is call three of Jerry Mahaffey's relatives—his mother, wife [**17] and sister—who testified about his upbringing in a bad neighborhood and his redeeming qualities as a family member, his loving relationship with his children and his nieces and nephews. Jerry Mahaffey testified to the terrible, punitive nature of life in prison. He argued reasonably well that which he could argue—the crime was fortuitous, not planned in advance, like a contract killing, that the jury should not kill anyone for all death is ter-

rible, and that life in prison is so bad that it is punishment enough.

Why did Decker act as he did? We have his written answers to Mahaffey's questions. Decker's responses are designated as preliminary and there are some things which escape his recall[5] but his basic response, fairly read, is that he spoke to members of his client's family and to his client. He was unaware of the fact that a clinical psychologist would have found Mahaffey had a full scale I.Q. of 67 but even so would have waited before introducing such evidence (at the suppression hearing) because of his own knowledge of his client's

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[5] Decker no longer has his case file. It either was routinely destroyed after the passage of some time or given to subsequent counsel. Mahaffey's counsel criticizes disposition of the file by noting that competency of counsel is an issue likely to arise in capital cases and that Decker ought to have kept his file. There may be some truth to this, but it sounds hollow in Mahaffey's mouth; the trial ended in February, 1985 and it was not until December 1991 that anyone ever attempted to interview Decker about the reasoning for his decisions in the conduct of the defense. Mahaffey had new counsel from the inception of the initial appeal process and they knew as well about the possibility of an attack on trial counsel's competence. If there are gaps in the historical record, they are as much or more the responsibility of Mahaffey's later lawyers as they are Decker's. And Mahaffey does not claim that his later lawyers were incompetent for failing to interview Decker at an earlier time. This is not surprising because it is ordinarily a tactical advantage to a defendant to let time pass and memories fade. Our law is that counsel's conduct cannot be defended on grounds that defense counsel does not offer. *Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990).* It is competent lawyering to wait and hope that the prior lawyer forgets all or part of the reasons for his actions. It is not very fair, however, to then offer belittling criticisms of trial counsel for failing to keep records to protect against forgetting. [**19]

ability to understand and communicate which I read to mean that Steven Decker did not think his client was retarded.[6] He did not see any [**18] need to have a psychologist examine his client (prior to the motion to suppress). While Jerry Mahaffey adopted the ploy of trying to portray some inability to read, counsel believed Jerry could read, and the introduction of evidence that he could not do so would have been fraud on the court. He had conversations with family members and anyone who indicated to him that they might have something useful to say. He interviewed the mitigation witnesses before putting them on the stand though this is disputed in part. He consulted with his client to discover if there were other witnesses that might be helpful on sentencing. He took some affirmative steps to explore past mental history, but does not recall what they were, and he believes that one reason he had no psychological examination performed before sentencing was his concern that his client would have confessed to the psychologist.[7]

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[6] I attach very little weight to counsel's post-hoc response to a question that essentially asks "If you knew you could have had a psychiatrist say your client was non compus mentis, would you have called him to the stand." Counsel who knows his strategy has failed may believe that any other option would be better than what was done.

[7] Mahaffey's counsel mocks Decker's concern about a full confession to a psychologist. This risk could have been diminished by counsel's presence at the interview, but the value of a psychological examination in which defense counsel reserves the right to control defendant's answers is not likely to be very useful. The privilege is helpful, but counsel may be reluctant to depend on the privilege as an absolute protection of confidentiality. See, e.g., *United States v. Diamond, 964 F.2d*

(continued...)

[*770] The clear purport of this is that nothing in his client's demeanor or actions showed Steven Decker that his client had a mental condition that would mitigate sentence, and in this regard he considered the written confession as well. Decker reviewed the conversations he had with family members, asked them for other potential witnesses, and interviewed trial witnesses and any others who indicated some contact with his client to see if they had something useful to say on sentencing. These are precisely the things which Hall said that defense counsel should do.

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[7] (...continued)
1325, 1328 (2d Cir. 1992) ("We recognize the existence of a psychotherapist-patient privilege . . . however, we also recognize . . . that the privilege is highly qualified and requires a case-by-case assessment of whether the evidentiary need for the psychiatric history of a witness outweighs the privacy interests of that witness.") See generally Thomas Zambito & Mary Jo Layton, Legal Experts See Erosion of Doctor-Patient Trust, The Record, June 10, 1994 (Dr. Paul Applebaum, Chairman of the American Psychiatric Association's Council on Psychiatry and the Law, noted a marked increase in the number of cases where courts allowed a breach of the doctor-patient privilege.) A full confession to a psychologist might put counsel in a difficult ethical position. More importantly, though, counsel does not now specifically rely on this, a psychological assessment which is made in the absence of a defendant's version of his mental state during the offense may be valueless. Indeed, Dr. Harry Gunn, Mahaffey's psychologist, here never explains in any way how it is that Mahaffey's criminal conduct is explained or mitigated by his mental condition. Dr. Gunn does not say Mahaffey did not know the seriousness of the offense or could not control himself or followed his brother down the path of evil. This contrasts to his clear opinion that it is highly probable Mahaffey did not understand the Miranda warning. Even without these considerations, Decker had an adequate basis for not seeking psychological examination, that is, his impressions of his client. [**20]

Steven Decker explicitly describes in the record before me an adequate investigation that he made into Mahaffey's sentence. It is implicit that based on his dealings with his client and his client's family that he saw no basis to pursue a psychological defense.[8]

There is no need to conduct [**21] an evidentiary hearing on counsel's reasons for his actions. He has explained them in written deposition, and it is clear that he would not be able to recall all of his reasons. His primary reasons, these he does recall and state, and nearly all of these are clearly inferable from the record. I did hold a hearing on May 22, 1997 with respect to certain concrete actions that Decker alleges he took and others deny, and I find as follows.

At the May 1997 hearing Myrtis Mahaffey testified that she had not been prepared for her appearance as a witness at Jerry Mahaffey's sentencing hearing. She also denied having much conversation at all with Steven Decker. Yet she did concede that she spoke to him once or twice a week during the time that he represented Jerry. And she admitted having called Steven Decker for legal advice within two months previous to the May 1997 hearing. I credit Decker's testimony that he prepared Myrtis Mahaffey for her testimony.

On the written transcript and even more so in the courtroom, Myrtis Mahaffey is an unhelpful and inarticulate witness. It is incredible that the testimony

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[8] In his affidavit, Mahaffey does not deny that he conferred with Decker. He specifically denies that Decker asked him about witnesses for the sentencing hearing.

she gave at trial could have been accomplished without decent preparation. Jerry Mahaffey [**22] was not a credible witness. I found that he did not answer questions in a truthful manner but rather with the aim of improving his chances in this case. His description of Steven Decker's conversations with him before and during trial is patently false given the evidence that was presented at trial (including Mahaffey's testimony on motions and at sentencing). Indeed Mahaffey reaches (or, more properly, overreaches) beyond his own counsel's present contentions about the nature of the incompetency of counsel. Here, too, I believe Steven Decker. Moreover, if the Jerry Mahaffey I saw in 1997 is like the Jerry Mahaffey that Steven Decker saw in the mid-1980s, then Decker is not to be faulted for failing to consider mental retardation. Prior to his arrest Mahaffey was employed full time, living with his family and reasonably capable of holding his own under examination. Mahaffey may not read well but I doubt that he is illiterate. It is true a psychologist found him nearly illiterate, but I doubt the result of any test which requires an earnest effort from Mahaffey who is, I believe, conscious of the fact that demonstrating an ability to read will not help his case. It is also true that [**23] Decker tried to give the trial court the impression that Mahaffey might not be able to read or understand the Miranda warnings. But Decker did not regard either of these things [*771] as truthful, and he did not have to regard them as so in order to argue that the prosecution failed to prove a knowing waiver of Miranda rights.

Finally, I credit Decker's assertion that he prepared Rita Mahaffey for her testimony. Steven Decker did

consider calling family members at trial, and I believe that he reasonably "thought the best ones to put on the stand were those that were called. . . ." Decker knew, after all, about the "division among the family . . . animosity between different members of it as a result of the . . . events that led to [Jerry's] arrest, which was put in force apparently by one of his brothers."

In sum, the evidentiary hearing and the written record establish that Steven Decker could have spent more time on the case and made further investigations. It does not establish that Steven Decker should have done so.

These decisions are within the range of reasonable competence.[9] But even if they are considered without according any deference to Decker's judgment, Mahaffey could not show [**24] prejudice under *Strickland v. Washington, 466 U.S. 668, 695, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).*

Consider first the evidence of mental retardation. A clinical psychologist found a verbal I.Q. of 71, a performance I.Q. of 67 and a full scale I.Q. of 67—all of which constitutes mild mental retardation. Mahaffey's counsel say

> Evidence of mental retardation is perhaps the most significant mitigating factor there is to defeat the death penalty. . . . This opinion is confirmed by

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[9] The only way in this case that Mahaffey can prevail on his claim of inadequate investigation is to assert that capital defense counsel must always seek psychological examination and must always seek to examine grammar school records. Petitioner's counsel candidly state that there is no precedent cited for the proposition.

> numerous social scientific studies which make clear that . . . the overwhelming majority of Americans also oppose the death penalty for mentally retarded defendants.

Despite this assertion, there are [**25] no "numerous social scientific studies" cited, there is only one, and it does not establish that evidence of mental retardation would have any reasonable probability of affecting the outcome here. Most of what is offered is simply the unscientific opinion of death penalty defense counsel, one in affidavit form and the other in the form of a law review article. Blume and Bruck, Sentencing the Mentally Retarded to Death, An Eighth Amendment Analysis, *41 Ark L. Rev. 725 (1988).* Their reasoning largely precedes from public opinion polling data of the sort cited by the court in *Penry v. Lynaugh, 492 U.S. 302, 334-35, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989),* which rejected the proposition that such polling data means the Eighth Amendment bars execution of the mentally retarded.

That many people do not think the mentally retarded ought to be executed is not of use, per se, in all cases. Mental retardation ranges from the mild to the severe, and no polls cited to me tend to prove that a person committing the offense in this case would be helped on mitigation of evidence of mild mental retardation. See *Penry, 492 U.S. at 338-39.*

There is one study that relies on more than generalization. [**26] In a project designed to determine the differences between death qualified jurors and non-death qualified jurors, a pool of 717 eligible jurors was given a hypothetical case involving insanity defenses—

two psychogenic, two organic. The mental retardation case was this:

> [A] 32 year old man with an I.Q. of 60 took his father's gun, robbed a liquor store and killed the proprietor, after watching a television program about a gang of hold-up men. [He] said that he robbed the store because he wanted money to buy candy and cigarettes and that he shot the proprietor "because robbers are supposed to." The defense psychiatrist said [his] intelligence is so limited that he could not have appreciated the seriousness of his crime.

What the survey showed was that both death-qualified and non-death-qualified jurors were just about equally likely to accept mental retardation as a defense. One could [*772] also read the study to show that organic mental disorders are likely to find more favor with jurors than purely psychogenic ones. See Ellsworth, Bukatz, Cowan & Thompson, The Death Qualified Jury and the Defense of Insanity, 8 L. & Human Behavior 45 (1984).[10]

[**27] The Ellsworth study does not carry weight here.[11] In this case, there are two homicides carried out

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[10] Judge Easterbrook considered this study and another, Project, Standardless Sentencing, *21 Stan L. Rev. 1297 (1969)*, and observed "whether such defenses actually help the accused is a close question. The Stanford study finds no effect. . . . And the Ellsworth study a small one." *Brewer v. Aiken, 935 F.2d 850, 862 (7th Cir. 1991)* (concurring opinion).

[11] The Assistant State's Attorney who argued and briefed this case was unfamiliar with the Ellsworth study. It is hard to understand how one could try to defend this death penalty judgment without apparently reading the Ellsworth article.

(continued...)

over a period of time by two persons, one of whom, Jerry Mahaffey, made successful efforts to eradicate evidence of fingerprints thus demonstrating understanding of the seriousness of the crime. Moreover, Jerry Mahaffey has consistently denied the crime and never offered an explanation for his actions, e.g., that he acted because he imitated what he saw on television or because he simply did as he was told by his brother. Even a lawyer who had read the Ellsworth article would have eschewed mental retardation as mitigation at least in part due to his client's refusal to offer (even today) an explanation of his actions that paired with evidence of mental retardation would serve to mitigate the offense.

[**28] Next, the psychologist who examined Mahaffey found borderline personality disorder whose characteristics include "impulsiveness, mood instability, inappropriate anger or control of anger." Mahaffey, said the psychologist, "finds it extremely difficult . . . to be able to control his impulses." The psychological disorder "can lead to periods of intense anger and acting out as well as emotional instability with extreme reactive shifts of mood and affect."

This is unpromising as mitigation although it might have a minimal chance of success if it were supported by some evidence that the personality disorder played some role in the conduct of the offense. But, it was not. The offense itself, as the Mahaffeys accounted for it in their confession, arose neither out of anger or impulse,

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[11] (...continued)
Nonetheless, the distinctions between Mahaffey's case and the hypothetical cases are obvious.

it arose out of greed and the desire to leave no witnesses. Of course, Mahaffey could have explicated his conduct in some psychological way or merely could have claimed a kind of emotional overload that prevented him even from recalling what he had done.

The evidentiary use of mental disease or defect has to be anchored in some account of the criminal acts in order to have any real weight with the jury. [**29] The relevant statute says so too since it speaks of finding mitigation in the fact "the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance. . . ." *Ill. Rev. Stat., 1983 Ch. 38,* Section 9-1(c). It matters not what disease or defect exists if it cannot be tied to the crime, and it is very difficult to do so when defendant persists in denying participating in the crime. For example, if the survivor had said the perpetrators were angry, or Jerry Mahaffey said he was angry, or Jerry Mahaffey said he could not recall what he was doing at the time of the crime, then at least the door to the mental condition mitigation is ajar. The door was never ajar here.[12] Even

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[12] There is an interesting contrast between this case and the prosecution of Andrew Kokoraleis, another capital case in which I have issued an opinion. Both trial counsel were circumscribed by what their clients had said to them, but in different ways. Andrew Kokoraleis' trial counsel did not need to have his client give an account of a disordered mental state during the crimes, the nature of the crimes themselves was enough but his ability to make the claim in mitigation foundered tactically on the fact that Kokoraleis swore that he played no role of any kind in the crimes during the guilt phase of the trial when he concededly received effective representation. Jerry Mahaffey's trial counsel was constrained by the fact that the nature of the crime (described by a survivor or de-

(continued...)

if it [*773] were, I could not find prejudice because this evidence shows only that the petitioner is both dangerous and out-of-control, and there is no reasonable probability that it would cause a single reasonable juror to vote against the death penalty on this ground alone. This is also precisely the kind of evidence of non-organic disorder that Judge Easterbrook noted as lacking in jury appeal. He is right. *Brewer v. Aiken, 935 F.2d at 861* (concurring opinion).

[**30] This leaves the items which Myrtis Mahaffey says she wishes to add to the testimony she gave. Essentially, she portrays herself as a poor mother who thought the correct response to a dispute between her daughter and another girl was to see that they staged a fair fight. She told the other mother, "Your daughter and my daughter, Rita are going to learn to defend themselves." She then watched the fight. Her children were rough, they would fight and break furniture. She says, without apparent irony, that "I don't know what they'd fight about. They just didn't seem to have basic respect for each other." At times, she told them "I'm going to let you kill each other and just come back and bury whoever's left." When Jerry Mahaffey was six or

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[12] (...continued)
scribed by the perpetrators) did not suggest a mental condition which would mitigate the offense. The only way psychological opinion about Mahaffey could be related to his crimes was for Mahaffey to state some factual basis for the relationship. This course would have been tactically available to his counsel (whose client did not effectively foreclose it by swearing to his innocence at the guilt phase) except for the fact that Mahaffey steadfastly denied the commission of the offenses and would provide nothing to link his mental condition to the dynamics of the crime.

seven, she fell into depression for many, many months. Jerry was always slow in school.

Rita Mahaffey, Jerry's sister, would have added to her trial testimony that Jerry would walk her home, that he was good at lifting people's spirits and either could not read or could not read too well. Other brothers and sisters say that Jerry was good to them. One set of neighbors would say that Jerry Mahaffey was a nice person. The most detailed description comes [**31] from an older sister who recounted that a man held a gun to Jerry's head when he was in grammar school (although Jerry himself does not recount this incident). Oddly enough, this sister said that "Jerry didn't have a temper," and she only learned later that he could not read; her son helped Jerry learn how to read.

This evidence is, in the setting of this case, worth very little. It is unclear from this family evidence whether Jerry Mahaffey could, in fact, read when the offenses were committed. Much of it is the same general evidence of a hard life in the neighborhood cumulative of that already offered. The evidence of lack of temper does not fit very well with the described borderline personality disorder. In sum, the additional evidence from the family and neighbors is largely cumulative. To the extent there is something non-cumulative, it can be construed in two ways. Either Jerry Mahaffey was part and parcel of a fighting and destructive set of violent siblings which is not a comfort to any juror seeking mitigation. Or, Jerry was kind to his siblings and his neighbors which does not mitigate what he did to strangers.

There remains the possibility that defense counsel could use [**32] all of this evidence in combination, but

the fundamental problem of tying the mental condition to the mechanics of the crime remains even if one adds the testimony of family and neighbors. And the evidence that Jerry did not have a temper does not help the claim of borderline personality disorder, and not one family member actually opines that Jerry Mahaffey was retarded in any sense other than his slowness in school.

It is no barrier to Mahaffey's petition that evidence could be aggravating as well as mitigating. This fact can justify counsel's decision not to use evidence, even a decision that is ultimately proven to be wrong.[13] But my judgment is not that this evidence can be aggravating, it is my judgment under the specific facts of this case that there is no reasonable probability that it would mitigate the sentence, that some of it would almost certainly aggravate the offense is beside the point.

[**33] Mahaffey's argument is that the mental condition evidence is not inconsistent with counsel's strategy at sentencing. This is so, [*774] he claims, because counsel conceded, as he had to, that the jury found Mahaffey guilty. No longer disputing guilt, or seeking to rely on a residual doubt theory, Mahaffey reasons, his lawyer could easily have argued mental condition which practically (though not logically) concedes guilt. Conceding that the jury found his client guilty is not the same thing as conceding guilt which Jerry Mahaffey

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[13] My view that counsel's conduct was competent is, of course, not based on his conscious decision not to present the evidence; it is based upon his conscious decision not to pursue a course of action which would have lead to the creation or discovery of such evidence.

was emphatically unwilling to do. Yet, any counsel needs to exercise care when making arguments of the sort Mahaffey suggests here. As Mahaffey notes, the credibility of counsel's argument against a finding of guilt had already been rejected and some caution must be exercised before new arguments, even arguably inconsistent ones, are made. Sentencing arguments are best when they build on the arguments made in the guilt stage.[14] Even if this problem could be overcome, the fact remains that Steven Decker could not connect the mental condition to the mechanics of the crime. His client might have done so, and the surviving witness might have done so, and the analysis [**34] of the criminal actions and their aftermath might also have served this purpose, but they didn't. The Ellsworth study showed how mental retardation can work to mitigate an offense where the retarded defendant killed because he learned from television that "robbers are supposed to." Mahaffey's counsel did not have the building blocks he needed to do what his client now says he

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[14] The dilemma is the reason that some lawyers have argued that a new jury ought to be empaneled for sentencing. Courts have rejected this claim but not because they did not acknowledge the existence of the dilemma. Cf. *McGautha v. California, 402 U.S. 183, 221, 28 L. Ed. 2d 711, 91 S. Ct. 1454 (1971).* The credibility of counsel's arguments does matter. Defense counsel can, of course, put the prosecution to its proof, arguing reasonable doubt and, failing this, can then say to a sentencing jury "my client has the right to insist on proof beyond a reasonable doubt which is all he did, now that you have found him guilty, you ought to know something about how he came to be guilty." This is difficult to execute. Steven Decker left this path open for his client, but his client did not provide a vehicle to use to travel on it.

should have done even where it is fully consistent with the defense.

[**35] It is difficult not to notice that habeas corpus counsel do not ever (in briefs or oral argument) provide a version of the closing argument they suggest. I suspect this is so because it would be neither coherent nor persuasive.

Steven Decker made a judgment not to seek a psychological examination, a judgment based on his dealings with his own client and his dealings with his client's family. Nothing that Jerry Mahaffey or his family say, even now, gives a basis for finding that judgment to be an act of incompetence. There is another decision Steven Decker made, although one must infer this from his 1996 answer to the question of why he did not seek early psychological examination. He decided he did not want his client to confess the crime to anyone including, I infer, himself. No one now criticizes this decision. Jerry Mahaffey's present counsel has filed an affidavit signed by his client; it is without an inculpatory statement. If one takes it as a given that Jerry Mahaffey cannot or will not give an account of the crime or, at least, of his mental state at the time of the crime, then the failure to have a psychological examination is meaningless in this case. Even if Steven Decker [**36] knew in advance (which he could not) that he would get an expert like Dr. Harry Gunn and receive a report like Dr. Gunn's, he would still be left with no way to tie the defendant's mental state or status to the commission of this crime. Steven Decker was limited then, as Mahaffey's counsel is now limited, by what his client told the Assistant State's Attorneys and by what his client was willing to say on the witness stand which presumably

is that he had no loss of memory and had nothing to do with the crime and was therefore under no extreme emotional or mental disturbance.

I have read the record and reject the claims of incompetency of counsel.[15]

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[15] Petitioner criticizes the way the state court addressed the issue. The Supreme Court of Illinois does know how to apply Strickland v. Washington to claims like the one made here. See *People v. Perez, 148 Ill. 2d 168, 592 N.E.2d 984, 170 Ill. Dec. 304 (1992)* (reversing death penalty for failure of counsel to investigate and present evidence of defendant's mental history). On the conduct of this mitigation hearing, a unanimous Court found that Jerry Mahaffey could not demonstrate prejudice, could not "prove that there is a reasonable probability that, absent counsel's deficient conduct, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *People v. Mahaffey, 165 Ill. 2d 445, 466, 651 N.E.2d 174, 185-86, 209 Ill. Dec. 246 (1995).* The Court regarded the additional evidence from the friends and family as cumulative, it regarded the evidence of psychological impairments as not inherently mitigating and emphasized its evaluation (with which I agree) of the sentencing result as driven by the fact that Jerry Mahaffey had escaped from prison while the murder charges were pending and refused to say that he would not escape again.

There is nothing in Strickland or in Supreme Court jurisprudence that precludes a state court from conducting the analysis of adequacy of representation by addressing only the prejudice prong of the analysis. My analysis of the claims addresses both prongs and comes to the same conclusion.

In simple terms, it is not arbitrary or inconsistent with Supreme Court precedent to decide that the mitigation evidence would not have made a difference and this, consistent with the facts and circumstances of this case, is what the Illinois Supreme Court did here. [**37]

[*775] Incompetence of Counsel on Defense at Trial

Conflict of Interest

It is not clear whether Jerry Mahaffey persists in his claim that Steven Decker had a conflict of interest because his law partner represented Reginald Mahaffey. This lack of clarity is due to the absence of the claim in Jerry Mahaffey's papers filed in response to the decision in *Lindh v. Murphy, 96 F.3d 856 (7th Cir. 1996)* (en banc), rev., *138 L. Ed. 2d 481, 117 S. Ct. 2059* (Jun. 23, 1997).

The claim, I find, is without merit. Representation of one defendant by a law partner of a co-defendant is not a per se violation of the Constitution. *Burger v. Kemp, 483 U.S. 776, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987).* Actual conflict must be shown. *Cuyler v. Sullivan, 446 U.S. 335, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980).* The conflict said to exist here is that Steven Decker should have argued that the crime was committed by Cedric Mahaffey and Reginald Mahaffey. Decker explained his refusal to do so with a question "If Cedric was a purported perpetrator of the offense, why would he name one of his co-conspirators?" The question serves as an adequate answer, indeed a persuasive answer, as to [**38] why Jerry Mahaffey's trial counsel would not want to suggest the guilt of Reginald. It is not credible that Cedric would name one of his co-conspirators and lie about the other, the personal risk to Cedric is too great. Otherwise, it is clear that Decker did suggest to the jury that Cedric Mahaffey was a perpetrator of the crime. The brothers Jerry and Reginald offered consistent defenses—"I did not do it and my confession was coerced." There was no conflict and each gave the other support on the coerced confession claim.

Failure to Obtain and Use Evidence at the Motion to Suppress

There are two parts to this claim.

First, there is a recurrence of the theme that Steven Decker ought to have had Jerry Mahaffey examined by a clinical psychologist. In this aspect of the case, the argument has more force than it did in the mitigation context because the psychologist's opinion can be tied to the facts of the case. Dr. Harry Gunn does say it was highly probable that Jerry Mahaffey did not understand his Miranda rights. Steven Decker's written answers on this subject tell us, if fairly read, why Decker did not have a psychological examination conducted. He thought the evidence [**39] would be questionable "given [Mahaffey's] written statements and my other knowledge as to his abilities to understand and communicate." This is why Decker now says he might have presented psychological evidence like that of Dr. Gunn only after all the other evidence was in. It is also the reason why he would not seek to obtain such evidence since, based on his impression of Jerry Mahaffey, including his ability to read, there was no reason for competent counsel in Decker's position to suppose a report like Dr. Gunn's would be forthcoming.[16]

Indeed, Steven Decker today says only that it is "possible" he would introduce Dr. Gunn's evidence even if he had it. As an [*776] experienced defense counsel, he may well have been aware that the prosecution could

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[16] Decker believed that Jerry Mahaffey could read. Dr. Gunn seemingly concludes that Jerry Mahaffey could read but at a level below the lowest 1% of the population which I assume means the lowest 1% of the population who can read.

also present expert evidence that [**40] even more severely retarded persons, particularly those with prior criminal experiences, would understand Miranda. See *People v. Henderson, 83 Ill. App. 3d 854, 863-64, 404 N.E.2d 392, 400, 39 Ill. Dec. 8 (1st Dist. 1980).* There was the further risk that in asking the trial court for appointment of a psychologist to determine competency to waive Miranda rights, defense counsel might have opened the door to the prosecution to request or the Court to order on its own a psychological examination by the court psychiatrist to determine competency to stand trial under Ill. Rev. Stat. 1983, Ch. 38, Sec. 104-11 and 103-13 (now 725 ILCS 5/104-11 and 5/104-13). Damaging statements made by defendants in such interviews are not admissible absent the raising of a mental condition defense but even inadmissible statements give an advance look to the prosecution of what the defense might have (or, more importantly, not have) to offer. It is true that Steven Decker does not expressly state this, but a practitioner experienced in criminal defense in Cook County would, I think, routinely give consideration to these matters in every case. It is apparent from the hearing that defense counsel [**41] did adopt a strategy of disclosing as little as possible to the court and the prosecutor. And it does not matter if he did not, the impression his client gave him is grounds enough to explain why no psychological examination was called for here.

There is another more important reason why the psychologist does not matter in Jerry Mahaffey's case, and this reason applies also to the second part of this argument about incompetence which is based on the affidavit of Charles Patterson, a neighbor of Jerry's who

heard screaming from the Mahaffey apartment on the night Jerry was arrested. He also heard various thuds and similar sounds which lead him to conclude that someone was being beaten. This would corroborate to some extent Jerry's claims of coercion. Of this potential testimony Decker was unaware, but he does say he is uncertain whether he would have called Patterson as a witness because "he may not have been able to support Jerry's position that he . . . Physically showed signs of being abused at the time of his arrest." This latter concern is justified because Patterson never saw Mahaffey that night.

Patterson's evidence is critical, says Mahaffey's present counsel, because the [**42] "question of whether Mahaffey was brutalized by the police therefore came down to a credibility determination between two groups of biased witnesses: the testimony of Mr. Mahaffey and his wife against the testimony of the police officers who allegedly brutalized Mr. Mahaffey" so "a disinterested witness would have been extremely significant."

This is not an accurate statement of what occurred at trial.

The credibility determination came down to a choice between Jerry Mahaffey and his wife on one side and (1) the police officers, (2) the Assistant State's Attorneys, (3) an Emergency Medical Technician, and (4) a photograph of Jerry Mahaffey taken around the time of his interrogation.

The interrogation photograph which I now have on my desk shows Jerry Mahaffey holding a soft drink can in one hand and a cigarette in the other. There is no sign of the substantial injury he claimed was inflicted

by a blow to his nose. The EMT at the Cook County jail recorded no evidence of trauma or complaints of brutality. Jerry Mahaffey testified he made a complaint of brutality to an Assistant State's Attorney, but the prosecutor credibly denied this. Another Assistant State's Attorney heard no complaint [**43] of brutality. A denial of any claim of mistreatment appears in the petitioner's written statement, and neither prosecutor saw evidence of prior mistreatment. They both thought his statement was voluntary and that he understood his rights. One prosecutor testified that Jerry Mahaffey read his confession and corrected the spelling of one word.

This is to be weighed against at least one inherently incredible aspect of Jerry Mahaffey's story. Several police officers testified that he had made incriminating admissions in his home and in the car on the way to the station and these same officers denied brutality. In his testimony, Jerry Mahaffey, pursuing [*777] an apparent policy of denying everything, contradicted both police assertions; that he incriminated himself and that the police did not abuse him. This left him in the position of arguing that in the face of atrocious physical violence he steadfastly refused to confess to officers who were torturing him. Only after the torture stopped and he was in the presence of two prosecutors and a court reporter, did he admit to the crime. Both of these two assertions can logically be true, but it is difficult to believe both. And the trier of fact [**44] did not believe at least one of them, the claim of coercion.

Under the law, the decision on questions of voluntariness and Miranda compliance are decided by the

preponderance of the evidence. *Lego v. Twomey, 404 U.S. 477, 30 L. Ed. 2d 618, 92 S. Ct. 619 (1972); Colorado v. Connelly, 479 U.S. 157, 93 L. Ed. 2d 473, 107 S. Ct. 515 (1986).* The trial judge found by "the great weight of evidence" there was no brutality and that overwhelming evidence refuted claims of brutality and claims of Miranda violations. On this record, the decision is clearly correct and neither testimony of Patterson nor Dr. Gunn had any reasonable probability of altering the result. Steven Decker's choices were limited by the state of the evidence and the court and not by lawyerly incompetence.[17]

There is a minor argument that Decker should have introduced evidence of a pattern and practice [**45] of police brutality in Area 2 from whence came the police officers who arrested Mahaffey. What present counsel produced here is not admissible. It is not tied to any of the officers who participated in a major way in this case. Habits and practices may be admissible, but not if they are not those of someone whose conduct is not at issue in the case. And this evidence, too, would have failed to carry the day because of the particular facts in this case.

The Closing Argument at the Sentencing Hearing

In *Simmons v. South Carolina, 512 U.S. 154, 129 L. Ed. 2d 133, 114 S. Ct. 2187 (1994),* the Court held that a capital defendant is entitled to have the jury told that the alternative to the death sentence is life imprison-

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[17] It is significant that Dr. Gunn never opines that Jerry Mahaffey is, or was, unable to recount concrete details of his experiences.

ment without parole where that is what state law provides and the prosecution has raised the question of future dangerousness. It is apparent from reading Simmons that the issue before that jury was whether the jury ought to risk the threat posed by the possibility of paroling a dangerous man.

Jerry Mahaffey argues that the rule in Simmons was violated in his case. His argument fails because Simmons is not retroactive, therefore does not apply [**46] to his case, and, even if it were, it would not require vacating the death sentence. See *Lambrix v. Singletary, 137 L. Ed. 2d 771, 117 S. Ct. 1517, 1525 (1997)* (holding that a case decided after a habeas petitioner's conviction and death sentence became final was a new rule under Teague v. Lane and therefore did not apply retroactively).

In *Spreitzer v. Peters, 118 F.3d 1211, 1997 U.S. App. LEXIS 21172, 1997 WL 273568,* *12 (7th Cir. 1997), the Seventh Circuit affirmed its earlier ruling in *Stewart v. Lane, 60 F.3d 296, 299-302 (7th Cir. 1995),* that Simmons was not to be applied retroactively. A closely divided court in another circuit reached the same conclusion. *O'Dell v. Netherland, 95 F.3d 1214 (4th Cir. 1996)* (en banc). To the extent that this issue was raised on a federal constitutional basis in state court, it was rejected on retroactivity grounds on the first appeal. *People v. Mahaffey, 128 Ill. 2d 388, 430-31, 539 N.E.2d 1172, 1192-93, 132 Ill. Dec. 366.* I am unpersuaded that it was ever raised on direct appeal as a federal constitutional claim that was adequately articulated. Certainly the Supreme Court of Illinois thought the only applicable precedent was its state law decision

in *People v. Gacho, 122 Ill. 2d 221, [**47] 522 N.E.2d 1146, 119 Ill. Dec. 287 (1988).*[18]

[*778] In any event, Simmons, if applied here, would not affect the outcome. The prosecution's arguments on sentence consume just short of sixteen pages of transcript.

In controversy are these lines,

> When they tell you that they will spend the rest of their lives in prison, there is no guarantee. [objection overruled]
>
> . . .
>
> There is not guarantee, ladies and gentlemen, not only because of what the law may say but because of what you heard from that witness stand. You know who you are dealing with."

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[18] Stewart v. Lane also resolves Mahaffey's claim that refusal to apply Gacho to his case on appeal was a denial of equal protection. This is, at bottom, a challenge to the power to apply decisions prospectively. This is so because all decisions which are limited, in any way, in retrospective effect draw arbitrary lines affecting favorably some litigants and not others whose only difference may be the fortuity of their appearance before courts with shorter briefing schedules and quicker decision times. A state court can constitutionally make its decision fully prospective and in doing so, draws no less an arbitrary line than does the federal system. See *Griffith v. Kentucky, 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708 (1987).* See also *Liegakos v. Cooke, 106 F.3d 1381 (7th Cir. 1997).* I find no support for a proposition that if some trial judges gave a Gacho instruction before it was required by state law, then it is an arbitrary denial of equal protection to refuse to require it in all cases, nor for a proposition that some eight defendants whose cases were on direct appeal when Gacho was decided were denied a federal right because Gacho was not applied to them. [**48]

(R. 4240-41)

> We will not tolerate it. You should not let them go. [objection overruled] You will be letting them go because you will be turning your back on the law and on justice. They will be let go. These two men who will not even say they were sorry for what they did. [objection overruled] They will have beaten it, make no mistake about it.

(R. 4243)

The closing arguments and the mitigation hearing evidence focused on the fact that Jerry Mahaffey escaped from the Cook County jail while these charges were pending. "On March 23 both Mahaffeys were armed with guns, both Mahaffeys escaped from the Cook County jail. . . . Jerry Mahaffey . . . tells you from this [**49] witness stand" that if given the opportunity to escape again, he doesn't know if he would do it.

The problem in Simmons was the suggestion that a defendant should be executed because otherwise he might be paroled. The only sentence of the argument in this case that might suggest such a possibility is "there is no guarantee . . . not only because of what the law may say." But, the implication from this sentence that the prosecutor is suggesting parole is neither necessary nor reasonable. See *DelVecchio v. Illinois Dept. of Corrections, 31 F.3d 1363, 1384-85 (7th Cir. 1994).* The prosecutor was talking about escape. It is rare that a prosecutor can do this, so the argument is rarely seen. Jerry Mahaffey, in custody for two capital murders, escaped from the county jail, and, in so doing, gave his prosecutors the right to claim that he was a man who would be dangerous to others in the future. The same law which would say he should stay in prison for life

also said that he should remain in custody while awaiting trial. He escaped at gun point. This is the argument that was made and it does not trigger the application of Simmons.

The argument that anything less than the death [**50] penalty will be a letting go of defendant was nothing more or less than a comment that the death penalty was the only just and legally correct sentence. No juror could have been under the impression that the choice was literally execution or letting go.

Peremptory Challenges

At the time of trial, Illinois allowed each defendant in a capital case a total of twelve peremptory challenges. The prosecution was allowed the same number as all defendants combined. Jerry Mahaffey had twelve, Reginald Mahaffey had twelve and the prosecution had twenty-four.

The petitioner makes a unique argument that allowing him half as many challenges as the prosecution is a violation of the Constitution. The short answer is that the prosecution had the same number of challenges against each defendant and as each defendant had against it; twelve to be exercised against one defendant and twelve against the other.[19] If this is not so then it is argued [*779] that *Wardius v. Oregon, 412 U.S. 470, 37 L. Ed. 2d 82, 93 S. Ct. 2208 (1973),* required that for every procedural right given to the prosecution, the same right must be given to the defense. Wardius did not say this, it required only that there [**51] be some

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[19] At trial, the prosecution used thirteen, the defendants together used eighteen.

balance—a state could not require complete discovery of the defense alibi without giving any discovery to the defendant. The Court did not attempt to qualify the balance in any other contest. Oddly enough, if petitioner is correct, existing federal criminal trial practice is unconstitutional. Most federal judges trying a two defendant case would give the prosecution six peremptories and each defendant five. See, e.g., *United States v. Banks, 687 F.2d 967, 976 (7th Cir. 1982);* Fed. R. Crim. P. 24(b). See generally *Ross v. Oklahoma, 487 U.S. 81, 89, 101 L. Ed. 2d 80, 108 S. Ct. 2273 (1988)* (commenting that the right to peremptories is impaired only if defendant does not receive that which state law provides). If one were to look for a Wardius compensating balance in Illinois law, one could find it in the right of the defendant to demand a jury in the first place which right the prosecution does not possess in Illinois. See *People v. Mueller, 281 Ill. App. 3d 1, 2, 666 N.E.2d 915, 217 Ill. Dec. 246, 247 (5th Dist. 1996);* Ill. Const. art. I, § 8.

[**52] The Illinois Supreme Court's decision on this point is entitled to deference under habeas law. *People v. Mahaffey, 165 Ill. 2d at 453-54, 651 N.E.2d at 180.*

Individualized Sentencing

The petitioner argues that a joint sentencing proceeding deprived him of the right to individualized sentencing. The basis of this claim is essentially that the prosecutors rarely differentiated between the brothers Mahaffey in closing argument, that evidence against Reginald was heard by the jury and that the brothers are "similarly aged black men from the same family" and (impliedly) the jury could not distinguish between them.

This argument works just as well, or as badly, for severance of the defendants at trial as well as sentencing. Jerry Mahaffey makes no argument here that he was entitled to severance at trial. He confines his claim to sentencing because he can cite precedent which requires individualized sentencing in death penalty cases. *Stringer v. Black, 503 U.S. 222, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992).* Nevertheless, the same rule applies with equal force to determinations of guilt and innocence. Ordinarily, jurors are instructed to give separate consideration to [**53] the case of each defendant as this jury was instructed. As a general principle, we accept that jurors can distinguish and do distinguish between separate defendants and the evidence against each of them. Evidence that in society as a whole, there exists a phenomenon of "out group homogeneity," apparently untested in jury work, does not establish that a jury, properly instructed, and sworn to do its grave duty, would not do it. Finally, both Mahaffey brothers acted together and even in the absence of Reginald Mahaffey as a defendant, the jury would have heard a great deal of argument about the Mahaffeys.

The Jury

A. Witherspoon

Patricia Botta was a prospective juror. When she was asked if she had any conscientious religious or moral scruples against the death penalty, she responded "I would not be for it, sir." When asked whether there were any circumstances under which she would sign a death penalty verdict, she answered "I really don't believe I could." Judge Hett thought the matter required further inquiry and put the issue in a more concrete way.

> I would be giving instructions concerning the criteria or standards that a jury is to follow or consider in coming [**54] to conclusion as to whether a case is appropriate for the death penalty. Would you be able to follow those instructions in arriving at a verdict unanimously with eleven other jurors?

Patricia Botta said

> I don't really know how to answer that, you know, because my feelings are definitely—I don't think I could really live with the situation.

Judge Hett excused the juror.

[*780] General objections to the death penalty are not grounds for judicial removal of a juror; only those views which would prevent or substantially impair a juror's ability to fairly consider the appropriateness of the death penalty in the case to be tried. *Witherspoon v. Illinois, 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770 (1968); Adams v. Texas, 448 U.S. 38, 65 L. Ed. 2d 581, 100 S. Ct. 2521 (1980).*

The decision whether this is true of a particular juror is remitted to the trial judge who sees and hears the juror answer the questions on voir dire. *Patton v. Yount, 467 U.S. 1025, 81 L. Ed. 2d 847, 104 S. Ct. 2885 (1984).* See *Wainwright v. Witt, 469 U.S. 412, 83 L. Ed. 2d 841, 105 S. Ct. 844 (1985).* There is nothing in the record to suggest the trial judge acted unreasonably in his [**55] judgment. He would have been within his rights to excuse Patricia Botta when she said "I really don't believe I could [sign my name to a death penalty verdict]." He went further to be sure he understood the juror's true position, and she confirmed that she did not think she "could live with the [decision in the death

penalty]". Judge Hett presided over jury selection with great care, and Patricia Botta was properly excused.

B. Batson

Jerry Mahaffey charges that prosecutors excused jurors (except for the first alternate) simply because they were black. See *Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986).* The same claim was made on direct appeal.

Batson was decided during the course of this case, while the case was on appeal. The Illinois Supreme Court remanded for a hearing and, after considering the trial court's ruling, rejected the claim.

In Batson, the Court provided for a two-step hearing to determine whether there is discrimination against black jurors. The first was to determine whether there was a prima facie case. The purpose of this requirement was, at bottom, an attempt to keep some faith with the idea of the peremptory challenge, [**56] a right of a party to excuse a juror without explanation. The Court would require explanation only after a reason to require one had been shown. See *Swain v. Alabama, 380 U.S. 202, 209-228, 13 L. Ed. 2d 759, 85 S. Ct. 824 (1965).* In Swain, the requirements for making a prima facie case were set quite high. In Batson, the Court lowered the requirements. It still left with the trial judge the decision whether a prima facie case had been made. Unlike employment cases,[20] there is no formula for determining the prima facie case under Batson. The Court said

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[20] *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).*

> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning [**57] the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Batson v. Kentucky, 476 U.S. at 96-97; see also *United States v. Armstrong, 517 U.S. 456, 134 L. Ed. 2d 687, 116 S. Ct. 1480, 1487 (1996); J.E.B. v. Alabama, 511 U.S. 127, 114 S. Ct. 1419, 1430, 128 L. Ed. 2d 89 (1994).*

The Court declined "to formulate particular procedures to be followed upon a defendant's timely objection." *Batson, 476 U.S. at 99.* The two-stage procedure suggested by the court—prima facie proof followed by explanation followed by a ruling on whether purposeful discrimination has been proved is sometimes followed but often is not. Assessing a prima facie case requires painstaking consideration of all relevant circumstances, while assessing the validity of a race-neutral explanation may simply require a determination of a prosecutor's [*781] credibility as to a particular challenge. [**58] In many cases, the prosecutor simply offers an explanation in response to an objection which makes the prima facie case decision unnecessary. *Hernandez*

v. New York, 500 U.S. 352, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991).

Jerry Mahaffey's counsel argued that the prima facie case was made because, he said, prosecution excused all seven blacks presented for non-alternate positions and also exercised the majority of its thirteen challenges against blacks, seven to six.

In this case, the prosecutors elected to dispute the showing of the prima facie case though they did explicitly deny basing challenges on race. The detailed explanation they did offer was directed to explaining the pattern of challenges. The Assistant State's Attorney said

> In the jury selection process, the choice of whether or not to choose or challenge a juror was dependent upon a combination of factors. Some . . . are readily apparent from the record. Other reasons are not [which] included our personal experiences, our knowledge of the case, our knowledge as trial lawyers, our gut instincts, our first glance impressions of the jurors as they sat in that chair. . . . We used a sliding scale of scrutiny . . [**59] . reasons which may have existed at the very beginning of this jury selection may have been amended, excluded, or changed due to the composition of those already selected, the number of challenges used or the overall totality of the circumstances surrounding that individual juror's background. . . . What may have been a primary reason to exclude early on in the jury selection may not have been of much importance later on, even though two jurors may have shared that individual trait.

The prosecutor also noted that they declined to use available peremptories against a black alternate and exercised them against whites and that given the length of the proceeding and the presence of only two

alternates, it seemed likely then that the alternate would sit.

The prosecutor then recited the details of jury selection and the order of challenges. He then noted various reasons for challenges apparent in the record, e.g., unwillingness to follow instructions, reluctance (not amounting to cause disqualification) to impose the death penalty, occupation, prior experience with police, youth, reluctance to consider penalties other than death, reluctance to serve on the jury and prior knowledge of the [**60] case. All of these reasons he noted were used to exercise challenges against both white and black jurors.

In response, Mahaffey's counsel pointed out that while the prosecution did apply its reasons to both white and black jurors, it left on the jury some white jurors who had the same sort of characteristics as excused black jurors, e.g., reluctance to serve because of sequestration, being a crime victim. He also expressed doubt about the sincerity of a prosecution challenge to someone whose problems with the law would have caused them to be unfair to defendants.[21]

Judge Hett began by noting that he doubted the prosecutor would be the sort of person who would practice discrimination. The heart of his ruling was his detailed analysis of the [**61] jury selection process, one in which he, rather than counsel, put questions to the

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[21] In this proceeding, Jerry Mahaffey seems to abandon the argument against peremptories excusing jurors for reluctance to serve, but he adds one that I do not find was made at trial, that the prosecution inconsistently applied its standards regarding juror's occupations.

venire. His pattern of questioning was standard and made without regard to race. The determination of the existence of a prima facie case is a factual question, and there is no reason to doubt the correctness of Judge Hett's findings. Absolute consistency in peremptory challenges is not required, and prima facie determinations have to be made on the totality of the circumstances. This is not to say that Judge Hett could not have decided the question the other way, but on this record, given his participation in the jury selection, his judgment that there was no prima facie case was permissible.[22]

[*782] The Supreme Court of Illinois affirmed this finding and observed the trial judges "are familiar with local conditions and prosecutors and can draw upon their power of observation and judicial experience as a guide in distinguishing a true case of discrimination from a false one." Just so.

The Petition for Writ of Habeas Corpus is denied.

ENTER:

James B. Zagel
United States District Judge

DATE: 4 Sep 1997

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[22] The claim that Judge Hett's conclusion was based in part upon his assessment of one prosecutor's character is not persuasive. Neither the rhetoric of the ruling nor its logic would suggest this to be so. There was one other prosecutor, indeed the lead prosecutor in the case, about whom Judge Hett explicitly said he would express no views at all. Had he rested his conclusion on the character of the prosecutors, he would have had to discuss the lead prosecutor as well. [**62]

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED petitioner's petition for a writ of habeas corpus is denied.

September 4, 1997
Date

APPENDIX F

UNITED STATES OF AMERICA ex rel.
JERRY MAHAFFEY, Plaintiff, v.
HOWARD PETERS, III, Defendant.

No. 95 C 6623

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

November 18, 1997, Docketed

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED, petitioner's motion to alter or amend judgment is denied.

Michael W. Dobbins, Clerk of Court

_____

Donald Walker, Deputy Clerk

Date: 11/14/97

APPENDIX G

UNITED STATES OF AMERICA ex rel.
JERRY MAHAFFEY, Plaintiff, v.
HOWARD PETERS, III, Defendant.

No. 95 C 6623

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
ILLINOIS, EASTERN DIVISION

December 18, 1997

* * *

DOCKET ENTRY:

* * *

(10) ☐ [Other docket entry] Petition (61-1) for a certificate of probable cause or, in the alternative, of appealability is granted.

* * *

APPENDIX H

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. JERRY MAHAFFEY, Appellant.
THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. REGINALD MAHAFFEY, Appellant

Nos. 61821, 61822

Supreme Court of Illinois

128 Ill. 2d 388; 539 N.E.2d 1172;
1989 Ill. LEXIS 64; 132 Ill. Dec. 366

April 20, 1989, Filed

SUBSEQUENT HISTORY: [***1] Rehearing Denied June 28, 1989.

PRIOR HISTORY: Appeal from the Circuit Court of Cook County, the Hon. Thomas A. Hett, Judge, presiding.

DISPOSITION: Affirmed. Reversed and remanded.

CORE TERMS: confession, juror, prosecutor, prima facie, death penalty, veniremen, woman, murder, venireman, rape, boy, peremptory, apartment, violence, corpus delicti, guilt, brother, gun, innocence, assailant, sentencing hearing, voir dire, sentence, venire, sexual assault, cross-examination, armed, theft, feet, closing argument

COUNSEL: Paul P. Biebel, Jr., and Randolph N. Stone, Public Defenders, of Chicago (Donald S. Honchell, Assistant Public Defender, of counsel), for appellant.

Neil F. Hartigan, Attorney General, of Springfield, and Richard M. Daley, State's Attorney, of Chicago (Terence M. Madsen, Assistant Attorney General, of Chicago, and Kenneth T. McCurry, Kevin Sweeney, Renee G. Goldfarb and Inge Fryklund, Assistant State's Attorneys, of counsel), for the People.

JUDGES: CHIEF JUSTICE MORAN delivered the opinion of the court. JUSTICE MILLER, concurring in part and dissenting in part. JUSTICE RYAN joins in this partial concurrence and partial dissent.

OPINION BY: MORAN

OPINION: [*393] [**1174] Defendants, Jerry Mahaffey (Jerry) and Reginald Mahaffey (Reginald), were indicted by a Cook County grand jury for the murders of Dean and Jo Ellen Pueschel, and the attempted murder of Richard Pueschel. Defendants were charged as follows in connection with the deaths of Dean and Jo Ellen Pueschel: intentional murder, knowing murder, and felony murder based on residential burglary, home invasion [***2] and armed robbery (Ill. Rev. Stat. 1981, ch. 38, pars. 9–1(a)(1), (a)(2) (respectively)); residential burglary based on theft and armed robbery (Ill. Rev. Stat. 1981, ch. 38, par. 19–3); home invasion (Ill. Rev. Stat. 1981, ch. 38, par. 12–11(a)(2)); armed robbery (Ill. Rev. Stat. 1981, ch. 38, par. 18–2(a)); armed violence premised on knowing murder (Ill. Rev. Stat. 1981, ch. 38, par. 33A–2); and theft (Ill. Rev. Stat. 1981, ch. [*394] 38, par. 16–1(a)). In connection with the death of Jo Ellen Pueschel, defendants were also charged with felony murder based on rape and deviate [**1175] sexual assault (Ill. Rev. Stat. 1981, ch. 38, par. 9–1(a)(3)); rape (Ill. Rev. Stat. 1981, ch. 38, par. 11–1(a));

deviate sexual assault (Ill. Rev. Stat. 1981, ch. 38, par. 11–3(a)); and armed violence premised on rape and deviate sexual assault (Ill. Rev. Stat. 1981, ch. 38, par. 33A–2). In connection with the assault on Richard Pueschel, defendants were charged as follows: attempted murder (Ill. Rev. Stat. 1981, ch. 38, par. 8–4); aggravated battery (Ill. Rev. Stat. 1981, ch. 38, par. 12–4(a)); aggravated battery premised on use of a deadly weapon (Ill. Rev. Stat. 1981, [***3] ch. 38, par. 12–4(b)(1)); aggravated battery of a child (Ill. Rev. Stat. 1981, ch. 38, par. 12–4.3(a)); home invasion (Ill. Rev. Stat. 1981, ch. 38, par. 12–11(a)(2)); armed violence based on attempted murder (Ill. Rev. Stat. 1981, ch. 38, par. 33A–2); and armed violence premised on aggravated battery (Ill. Rev. Stat. 1981, ch. 38, par. 33A–2). All of the armed violence counts were dismissed on the State's motion. The defendants were tried jointly before the same jury on each of the remaining counts. At the conclusion of the State's case in chief, the trial court granted Jerry's motion for a directed verdict on the deviate sexual assault charge. At the conclusion of all of the evidence, the jury found Reginald not guilty of deviate sexual assault, but found both defendants guilty of all remaining charges. The State requested a hearing to consider whether the death penalty should be imposed. (Ill. Rev. Stat. 1981, ch. 38, par. 9–1(d).) The jury which convicted the defendants also sat at the sentencing phase. The jury found defendants eligible for the death penalty, and found there were no mitigating factors sufficient to preclude imposition of the death penalty. [***4] The defendants' death sentences were stayed (107 Ill. 2d R. 609(a)), pending direct appeal to this court (Ill. Const. 1970, art. VI, § 4(b); 107 Ill. 2d R. 603). This [*395]

court consolidated the defendants' appeals after oral arguments in these cases.

On April 30, 1986, while defendants' appeals were pending in this court, the United States Supreme Court filed its opinion in *Batson v. Kentucky (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.* The Court held that a defendant may rely solely on evidence concerning the selection of the jury at his own trial to establish that a prosecutor has unconstitutionally exercised peremptory challenges against potential jurors solely on account of race. (*Batson, 476 U.S. at 95, 90 L. Ed. 2d at 87, 106 S. Ct. at 1722.*) The court subsequently held that Batson was retroactively applicable to all cases pending on direct review when the decision was announced. *Griffith v. Kentucky (1987), 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661, 107 S. Ct. 708, 716.*

In light of the Batson and Griffith decisions, [***5] this court issued supervisory orders in these cases on October 26, 1987. In those orders, we retained jurisdiction of these causes and directed the trial court to conduct an expedited hearing to permit the defendants to present evidence to substantiate their claim of unconstitutional discrimination in the exercise of peremptory challenges. Our supervisory order also stated that if the trial court found that a prima facie showing of such discrimination had been made, it should then determine whether or not there is a neutral explanation by the State for the exercise of the questioned peremptory challenges. The court conducted the hearing on November 30, 1987, and found that defendants had failed to establish a prima facie case of discrimination.

On return of the cases to this court, defendants raise numerous issues alleging errors at all stages of the

proceedings. The issues we must address as to Jerry are: (1) whether the trial court erred in finding that Jerry failed to establish a prima facie case of discrimination under Batson; (2) whether the trial court erred in excusing a venireman for cause without further inquiry into her [*396] sentiments regarding [***6] the death penalty; (3) whether the trial court erred in admitting Richard Pueschel's in-court identification of Jerry as one of the perpetrators of the crimes; (4) whether a comment made by Jo Ellen Pueschel's mother from the gallery during the redirect examination of Reginald denied Jerry a fair trial and a fair sentencing hearing; (5) whether some of the prosecutor's remarks during trial and closing argument had the effect of shifting the burden of proof to [**1176] Jerry and undermined the presumption of his innocence; (6) whether the State failed to prove the corpus delicti of the rape; (7) whether the prosecutor's remarks during the sentencing phase sought to minimize the jury's responsibility for determining the appropriateness of death, in violation of *Caldwell v. Mississippi (1985), 472 U.S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633;* (8) whether the trial court erred in refusing to instruct the jury that if it failed to sentence Jerry to death, the court would sentence him to a term of natural life; (9) whether the trial court erred in holding a joint death penalty hearing; and (10) whether Jerry's death sentence is excessive given his "light [***7] criminal background." Jerry also asks that we reconsider our prior cases upholding the constitutionality of the Illinois death penalty statute.

Reginald raises the same issues as does Jerry. Reginald raises four additional issues: (1) whether the trial

court erred in failing to grant a severance because the admission of Jerry's confession implicating Reginald in the crimes denied him his right to confront witnesses; (2) whether the trial court erred in finding Reginald fit to proceed at trial without requiring a full examination of him; (3) whether the trial court erred in admitting a medical record as past recollection recorded during his pretrial suppression hearing; and (4) whether the trial court erred in denying Reginald's motion to quash his arrest and suppress evidence. Because we hold that the trial court erred in failing to grant a severance, and conclude that Reginald's case must be remanded for a new [*397] trial, we need not address the other issues raised in his brief. We therefore limit our recitation of the testimony introduced at the guilt and sentencing phases to only those facts which are relevant to the issues raised by Jerry.

The record reveals that on the [***8] morning of August 29, 1983, Joseph Heinrich found the dead bodies of his daughter, Jo Ellen Pueschel, and his son-in-law, Dean Pueschel, in the Pueschel home. Mr. Heinrich found his grandson, Richard Pueschel, severely beaten and wandering near the alley by the family home. Several items were missing from the Pueschel home, including: a .357 Magnum revolver; a Zenith video recorder and several videotapes; an Atari video game console and seven game cartridges; several items of jewelry belonging to all three victims; and the Pueschels' 1982 red Chevrolet Camaro.

Eleven-year-old Richard Pueschel testified that during the late evening of August 28, or the early morning of August 29, 1983, he awoke to find himself in a headlock. He heard two separate voices tell him to "shut up

and be cool." Richard further testified that he either fell back asleep or was knocked out, and later woke up and walked into the kitchen "in a daze." Once in the kitchen, he was told to lie on the floor next to his mother. Richard testified that while he was lying on the floor, he could see his mother lying on the floor next to him out of the corner of his eye. He stated that he could see she was being struck. [***9] He could not remember what happened to him at that time. At the conclusion of his direct testimony, Richard identified both defendants as being the two men who were in his home that night. On cross-examination, Richard admitted that he had been unable to identify the defendants in a line-up conducted while he was being hospitalized for his wounds, and denied having seen the defendants' pictures in the newspaper. Richard further testified that he had described the assailants to Detective Ryan of the Chicago police department. [*398] He described one assailant as being 5 feet 10 inches to 5 feet 11 inches in height, medium build, weighing between 160 to 180 pounds, wearing a medium afro, possibly having a scar on his left cheek. He described the other assailant as being 5 feet 9 inches or 5 feet 10 inches in height, "skinny" build, weighing between 150 to 170 pounds, wearing his hair in a short afro and having a short mustache. He denied giving any other description to the police.

Chicago police Detective Anthony Graffeo testified that his investigation of these crimes began at the Pueschel home on the morning of August 29, 1983. Detective Graffeo acknowledged that his report [***10] concerning the incident contained a description of the assailants which differed from the [**1177] description

Richard gave to Detective Ryan. Detective Graffeo's report indicated that one assailant was a 25- to 30-year-old black male, 6 feet 2 inches in height, 210 pounds, with a "scraggly" beard and wearing a white shirt. The second assailant was described in the report as being a light-complected black or Latino male, approximately 25 to 30 years of age, 5 feet 4 inches to 5 feet 6 inches in height, weighing 125 pounds and wearing dark clothing. Detective Graffeo stated that his report was based upon a canvass of residents of the apartment building in which the Pueschels resided.

Sergeant Frank Piercezynski of the Chicago police department testified that while on duty on August 30, 1983, he discovered a 1982 red Chevrolet Camaro in a parking lot at 2245 West Lake Street. The automobile was later identified as belonging to the Pueschels.

Sergeant John Byrne of the Chicago police department testified that at approximately 2 a.m. on September 2, 1983, he met with one of defendants' brothers, Cedric Mahaffey. Based on the information received from Cedric, the Chicago police arrested defendants [***11] and seized from their residences certain property which belonged to the Pueschels. The property seized from Jerry's [*399] residence included the Zenith video recorder and the Atari video game console and game cartridges. The property recovered from Reginald's apartment included the .357 Magnum revolver and 24 pieces of jewelry. Sergeant Byrne also testified that Reginald removed a man's ring from his hand and a watch from his back pocket after he was arrested. The ring and the watch were later identified at trial as also belonging to Dean Pueschel.

Sergeant Byrne admitted on cross-examination that despite Cedric Mahaffey's knowledge of facts concerning the crimes which were unknown to the general public, he was never arrested nor were his fingerprints compared to those found in the Pueschel home. Sergeant Byrne also admitted that Cedric Mahaffey is a light-complected black male.

Upon further cross-examination, Reginald's counsel inquired into certain statements Cedric Mahaffey made to Sergeant Byrne. Based upon this line of questioning, the State was allowed, over defense counsel's objection, to inquire on redirect examination into the substance of the conversation Sergeant [***12] Byrne had with Cedric Mahaffey.

After the trial court orally instructed the jury to consider the testimony in determining the guilt or innocence of Reginald, Sergeant Byrne testified in substance as follows. He and Detective Charles Grunhard met with Cedric Mahaffey, who told them that "he knew who committed a double murder on the north side of Chicago a couple of days earlier." When asked who had committed the murders, Cedric told the officers that he did not want to tell them who they were until he could be sure of their involvement. Cedric then asked the officers whether any guns were taken. After Sergeant Byrne told him that there were guns taken in the incident, Cedric went on to correctly describe to Sergeant Byrne the guns that were taken in the incident.

[*400] Cedric then told Sergeant Byrne that he would not tell him the names of the men who committed the murders but that he would tell him where they lived. Cedric then retrieved a video cassette tape of the film

"Papillon" from the trunk of his car, and told Sergeant Byrne that the tape had been taken from the victims' home. Cedric then described how he obtained the tape.

On Thursday, September 1, 1983, at 7 o'clock [***13] in the evening, Cedric received a telephone call from a "friend" who asked him to go to the "west side to help him move some stuff." An hour later, he drove with his friend and another person to an apartment on the west side, where he helped them load video equipment and video cassettes into the car. Cedric also saw a .357 Magnum and a 12-gauge shotgun in the apartment.

Cedric and the friend then drove to a location on the south side and carried the items into a house. While carrying the items into the house, the friend told Cedric [**1178] that "he and the other friend got these items committing a burglary, and that they had to kill a couple of people." Upon hearing this, Cedric removed the videotape from the box he was carrying in order to show the police. When Cedric asked his friend if he was kidding, the friend said, "No[,] [w]e killed a couple of people on the north side and a little boy lived." When Sergeant Byrne asked who the people were who had committed the murder, Cedric told him their names were Reginald and Jerry, and that they were his brothers.

Cedric then began to relate more of the conversation he had had with one of his brothers regarding the crimes. From the conversation, [***14] Cedric learned that Reginald and Jerry had gone to the north side to commit a burglary, but that the van they were driving "broke down." They left the van and crawled through an open window and found a boy asleep. They beat the

boy and then went into another room and found a man and a woman. They beat the man and the woman and then had sex with the woman. They removed several items from [*401] the house, loading them into the car "that was in the driveway."

Cedric stated that the Tuesday following the crimes, Jerry went to Reginald's house where they divided up the property. Jerry took the rifle, the Atari game and the video recorder, and took them to his brother Terry's apartment. The day before he was arrested, Jerry retrieved the property from Terry's apartment and brought it to his house.

Cedric told Sergeant Byrne that the .357 Magnum and the shotgun would be found where Reginald was staying. Cedric also told Sergeant Byrne that the video equipment and cassettes would be found in Jerry's apartment and the carbine would be found in his brother Terry's apartment.

Assistant State's Attorney Irv Miller testified that both defendants gave statements, each of them admitting [***15] complicity in the crimes and implicating the other as well. Over defense counsel's objections, the statements were read to the jury without redacting them to exclude references to the nondeclaring defendant. The jury was instructed that each defendant's statement should only be considered as evidence against the person making the statement.

The substance of Jerry's statement is as follows. On August 29, 1983, Jerry and his brother, Reginald, had discussed committing a burglary on the "north side." Both he and Reginald drove to the corner of Howard and Western Streets, where they were going to bur-

glarize a clothing store. However, Jerry saw a "paddy wagon" in an alley, so Reginald drove the van around the block and parked in a hospital parking lot. After they decided not to burglarize the store, they attempted to start the van but were unable to do so because the battery was "dead." Jerry and Reginald left the van and started walking toward an alley. Seeing an open window, Reginald removed the screen and Jerry entered the apartment with Reginald following behind him.

[*402] The room they first entered was the bathroom. They proceeded out of the bathroom and into the "grown-ups [***16] room" and then the "boy's room." Both men then entered the kitchen where Reginald picked up a knife. Jerry wiped everything Reginald touched "for not finding fingerprints." They both proceeded into the "little boy's room." Jerry approached the child and tried to strangle him with a towel. They then put a pillow over his head and Reginald stabbed him four to five times. As the boy continued to struggle, Jerry hit the boy over the head with a baseball bat he had found in the boy's room.

Reginald and Jerry each took a baseball bat from the boy's room, and entered another room where they found two people lying in bed. Reginald stood on the left side of the bed next to the woman. Jerry stood on the right side of the bed next to the man. They both proceeded to hit the man on the head with the baseball bats. Reginald took the woman into another room where he forced her to perform fellatio and have vaginal intercourse with him. Jerry went into the room where Reginald and the woman were, but returned to the room in which the man lay and "saw the man pulling a pistol out." Jerry hit the [**1179] man over the head with the baseball

bat and returned to the living room. Reginald asked the woman [***17] where the other guns were, to which the woman replied, "there [were] more above the dresser on the wall." Jerry and Reginald went back into the bedroom in which the man lay to retrieve the weapons. Jerry was unable to remove a "pump and [a] thirty-thirty" because they were locked in a rack on the wall. However, Reginald was successful in removing a shotgun. During this time, the man began to move, and Reginald stabbed him four to five times in the chest and side.

Reginald asked the woman for the keys to her car. The woman accompanied Reginald out to the car so she could turn off the car alarm. He and the woman went back into the house, and he began to load several items from the house into the car.

[*403] Jerry then identified the items seized from his residence as well as his brother's residence as being the items taken from the home they had burglarized. These items included a shotgun, a rifle, three boxes of ammunition, a box of "tapes," an "arcade game" and several items of jewelry.

After loading the items into the car, Jerry went back into the house and told the woman to lie down. The boy then said "Ma-ma, Ma-ma," after which she and the boy lay down. Reginald struck [***18] her on the head several times with a pistol, causing her death.

Reginald and Jerry drove the car to Reginald's house, where they left the property taken from the home. They then abandoned the car at the Henry Horner projects.

While Reginald's statement corroborated Jerry's statement in many respects, there were differences. For

example, Jerry stated that the plan to burglarize the clothing store was abandoned because they saw a police wagon while Reginald claimed it was abandoned because of the traffic. Jerry stated that he followed behind Reginald and wiped his fingerprints from every item he touched, a fact not mentioned in Reginald's statement. Reginald stated that he had vaginal intercourse with the woman, and that he saw the woman performing fellatio on Jerry. Jerry also stated that Reginald had vaginal intercourse with the woman. However, he did not state that the woman performed fellatio on him. Rather, he stated that the woman performed fellatio on Reginald. Reginald claimed that Jerry stabbed the boy while Jerry said that Reginald committed the stabbing. Jerry also claimed that Reginald stabbed the man four to five times while Reginald failed to mention the stabbing [***19] in his statement. Jerry stated that as the woman lay on the kitchen floor Reginald hit her over the head with the revolver. In contrast, Reginald stated that as he left the house, he could hear "solid hits" which "told him [that Jerry] was finishing the lady and her son off with the bats."

[*404] Expert testimony regarding the physical evidence discovered at the scene indicated that several of the fingerprints found matched those of Dean and Jo Ellen Pueschel. None of the prints found at the scene matched either of the defendants' finger or palm prints. However, testimony further indicated that the finger or palm prints of Richard Pueschel and Cedric Mahaffey were never submitted for comparison. The testimony also indicated that the vaginal swab taken from Jo Ellen Pueschel tested positive for the presence of sperm, and that her vagina was "widely patent," but

did not show signs of abrasions or trauma. The expert who examined the vaginal swab was unable to determine when intercourse had occurred. Moreover, the expert could not determine the assailant's blood type because the swab did not reveal the presence of "ABO blood substance."

Defendant Jerry Mahaffey's theory at trial [***20] was that the police had beaten him and extracted a false confession from him. He contended that he had rehearsed his statement with the police and the assistant State's Attorney prior to the arrival of the court reporter. Jerry also asserted that the lack of identification and physical evidence linking him to the crime created a reasonable doubt as to his guilt. Defendant Reginald Mahaffey's defense at trial echoed Jerry's. In addition, Reginald asserted [**1180] that Cedric Mahaffey's intimate knowledge of the crimes demonstrated that he was the person who had committed them. Reginald testified in his own behalf, denying that he had committed the crimes for which he was charged. He at first denied that the Pueschels' property had been recovered from his residence. However, Reginald stated later that he purchased the TV, jewelry and guns from a man who visited the apartment shortly before he was arrested.

The jury found both of the defendants guilty of murder, attempted murder, home invasion, rape, armed robbery, residential burglary, aggravated battery and theft. Reginald was found not guilty of deviate sexual assault. [*405] The State then moved for a death penalty hearing. As [***21] previously noted, our recitation of the evidence introduced at the sentencing hearing

will be limited to the evidence concerning the sentencing of Jerry only.

The State presented evidence concerning a prison escape in which Jerry participated while he was incarcerated awaiting trial. Vernon Williams, a Cook County correctional officer, testified that on March 23, 1984, at approximately 9 p.m., Reginald, armed with a gun, entered the prison security office with another inmate who was dressed in an officer's uniform. Pointing the gun at Officer Williams, Reginald told the officer to lie on the floor. The witness testified that Jerry Mahaffey entered the office along with two other inmates, and that all of the prison employees present were told to lie on the floor. The witness further testified that as the inmates proceeded to remove some of the officer's uniform, Jerry took $650 from him. The witness indicated that Jerry was armed with a gun at that time. The record shows that Jerry successfully escaped but was recaptured two days later.

The State also introduced into evidence certified copies of Jerry's prior convictions. The record shows that defendant was convicted of robbery [***22] in 1974, 1976 and 1981. His record also contains convictions on two counts of theft and one count of retail theft, all in 1980.

In mitigation, Jerry's mother, Myrtis Mahaffey, testified that she had raised the family alone in the Chicago housing projects, where violence and gang fights were common. She described Jerry as a "fun-loving" person, and said that she loved him and would miss him when asked how his death would affect her.

Jerry testified in his own behalf stating that he had a wife and two children whom he had tried to support

by working in a bowling alley as a janitor. He also stated that he wanted to live. Over objection of his counsel, the State questioned him regarding his involvement in the crimes at issue. He denied being present in the Pueschel [*406] home. When asked whether he would attempt to escape from prison again, Jerry replied, "I don't know."

Jerry's wife, Carol Mahaffey, testified that Jerry had a close relationship with his daughters. She also stated that she wanted Jerry to live to help support the family and she also wanted her newborn child to know her father.

The jury found Jerry to be over 18 years of age (Ill. Rev. Stat. 1985, ch. 38, par. [***23] 9–1(b)) and also found that he had been convicted of two or more murders (Ill. Rev. Stat. 1985, ch. 38, par. 9–1(b)(3)). Finally, the jury found that Jerry had been convicted of murdering someone during the commission of the felonies of armed robbery, rape, home invasion or residential burglary. (Ill. Rev. Stat. 1985, ch. 38, par. 9–1(b)(6)(c).) The jury also found that there were no mitigating factors sufficient to preclude imposition of the death penalty.

The facts which are relevant to our resolution of Jerry's Batson claim are as follows. The record reveals that Jerry is black and the victims are white. During voir dire, the trial court noted the race of each venireman on their respective juror cards. Certified copies of the relevant juror cards have been included with the record on appeal. The State was given a total of 24 peremptory challenges; eight were exercised against white jurors and seven against black jurors. Jerry's counsel made a motion to dismiss the venire each time the

State struck a black venireman [**1181] from the jury, alleging that the State was improperly excluding blacks from the jury. At the conclusion of voir dire, he made another motion [***24] to dismiss the venire, alleging that the State had exercised its peremptory challenges to remove all seven black veniremen who remained after challenges for cause. He stated that one black juror had been accepted by the State as an alternate only after it had exhausted its peremptory challenges.

The trial court reviewed the relevant case law. Without citing to a particular case, the trial court stated that [*407] it disagreed with a recent decision of this court which reaffirmed the pre-Batson rule that the State is not required to come forward with reasons for the exercise of its peremptory challenges, even where it is responsible for excusing a majority of the black veniremen from the venire. However, the court recognized that it could not require the State to come forward with reasons for the questioned challenges, although it invited the State to do so. The State declined the invitation. The trial court denied Jerry's motion to dismiss the venire.

At the Batson hearing held pursuant to our supervisory order, Jerry's appellate counsel made several arguments in support of his claim that he had established a prima facie case of discrimination under Batson. [***25] Counsel argued that the State intended to dismiss all of the black veniremen without seriously considering them for jury service. He asserted that this intent was demonstrated by the fact that the State made no special inquiry of the prospective black jurors during voir dire. He also emphasized that the State had removed all of the black veniremen who remained after

challenges for cause, and that the State's action caused the trial court to ask the State to explain the reasons for its challenges. He concluded that these facts established a prima facie case of discrimination.

The State made several arguments in support of its position that defendant had failed to establish a prima facie case. First, the State noted that it had accepted a black woman as an alternate juror. The State further argued that it had exercised more challenges against white veniremen than black veniremen. Finally, the State gave its criteria for challenging the seven black veniremen, asserting that the criteria were applied to all veniremen, without regard to race.

The trial judge began his analysis by acknowledging that defendant is black, and that the judge may rely on the fact that "peremptory [***26] challenges constitute a jury selection practice that permits discrimination." The [*408] judge then commented on his observations of the two assistant State's Attorneys who tried the case, Mr. Malatesta and Mr. Tsukuno. While admitting that he had not had much experience with Malatesta, he stated that as to Mr. Tsukuno:

> "I have had a lot of experience with Mr. Tsukuno, who represented the State in this courtroom for I believe better than a year, maybe even more. And he was what is known as the first chair in this courtroom, which meant that he was responsible for all of the cases and directed the assistants who were in this courtroom.
>
> * * *
>
> I have never found Mr. Tsukuno to be one who practiced any type of discrimination at all.
>
> * * *

> So in that respect I don't believe that this presumption that challenges can permit discrimination if they would wish to do so can fairly be a presumption that I can put up and compare against Mr. Tsukuno. He is not that type of person."

The court then went into a detailed analysis of the jurors whom the State struck from the jury, noting that the characteristics of the eight white jurors who were stricken from the jury were the same as the [***27] characteristics of the black jurors who were stricken from the jury. The court added that several of the white veniremen shared more than one characteristic with their fellow black veniremen. The court then compared the characteristics of the white and black veniremen the State struck from the jury. For example, the [**1182] trial court noted that the State struck one white and one black teacher; one white tradesman and one black tradesman; one white writer and one black writer; one white draftsman and one black engineer; two white veniremen and one black venireman who had been accused of a crime; and five white veniremen and two black veniremen who had been victims of crimes. After considering all of the relevant circumstances, the trial court found that defendant [*409] had failed to establish a prima facie case of discrimination.

The first issue we address is whether the trial court erred in failing to grant Reginald's motion for a severance. Reginald argues that the admission of Jerry's confession implicating him in the crimes denied him his right to confront witnesses. Jerry does not join in this argument because Reginald testified at trial and was subject to cross-examination [***28] concerning his statement implicating Jerry in the crimes.

Citing *Lee v. Illinois (1986), 476 U.S. 530, 539, 90 L. Ed. 2d 514, 525, 106 S. Ct. 2056, 2061,* the State argues that the presumptive unreliability of Jerry's confession was rebutted by sufficient indicia of reliability and trustworthiness to render it independently admissible against Reginald. The defendant in Lee was charged along with a codefendant, Thomas, with the commission of a double murder. (*Lee, 476 U.S. at 531, 90 L. Ed. 2d at 520, 106 S. Ct. at 2057.)* Neither defendant testified; however, the trial court expressly relied on Thomas' confession in determining Lee's guilt. On appeal, the Supreme Court was asked to decide whether the use of Thomas' confession at their joint trial violated Lee's rights under the sixth amendment confrontation clause as applied to the States through the fourteenth amendment. The court held that Thomas' confession did not bear sufficient indicia of reliability; therefore, the confession could not be used as substantive evidence against Lee. *Lee, 476 U.S. at 546, 90 L. Ed. 2d at 530, 106 S. Ct. at 2065.*

[***29] The Supreme Court began its analysis by stating that the circumstances surrounding Thomas' confession did not establish that the confession was reliable. The court noted that Thomas originally refused to talk to the police and only did so after he learned that Lee had implicated him in the murders and had urged him to share "the rap" with her. The Court further noted that the "statement was given in response to the questions of police, who, having already interrogated Lee, no doubt knew [*410] what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent." *Lee, 476 U.S. at 544, 90 L. Ed. 2d at 528, 106 S. Ct. at 2064.*

The Supreme Court also rejected the contention that Thomas' confession was reliable because it "interlocked" with Lee's on some points. The Court stated that the confession diverged in many respects, including Lee's role in the planning of one of the murders, the part she played in the facilitation of the other murder, "and certain factual circumstances relevant to the couple's premeditation." (*Lee, 476 U.S. at 545-46, 90 L. Ed. 2d at 529, 106 S. Ct. at 2065.*) [***30] Four justices dissented, stating that Thomas' statement was clearly against interest and did not attempt to shift the blame to Lee. (*Lee, 476 U.S. at 553, 90 L. Ed. 2d at 534, 106 S. Ct. at 2069* (Blackmun, J., joined by Burger, C.J., Powell and Rehnquist, JJ., dissenting).) Finally, the dissent noted that Thomas' confession was corroborated not only by Lee's confession but also by the physical evidence introduced at trial, and concluded that these facts rendered the confession reliable. *Lee, 476 U.S. at 554-57, 90 L. Ed. 2d at 535-37, 106 S. Ct. at 2069-71.*

Here, the State does not argue that the circumstances surrounding Jerry's confession demonstrate that it bears sufficient indicia of reliability. The State relies instead on the purportedly "interlocking" nature of the confessions and testimony adduced at trial which it claims corroborates the confession.

The State essentially ignores the fact that in almost every instance, the confessions diverge on the question of who was responsible for the attacks on the Pueschels. Just as in Lee, these differences "go to the very issues in dispute [***31] at trial: [**1183] the roles played by the two defendants in the" crimes for which they were charged. (*Lee, 476 U.S. at 546, 90 L. Ed. 2d at 529, 106 S. Ct. at 2065.*) For example, in his confes-

sion, Reginald claimed that Jerry stabbed the boy. Jerry stated in his confession [*411] that Reginald was responsible for the stabbing. Both Reginald and Jerry stated that Reginald had vaginal intercourse with the woman. However, Reginald claimed that the woman performed fellatio on Jerry, while Jerry claimed the woman performed fellatio on Reginald. Reginald never mentioned stabbing the man. By contrast, Jerry claimed Reginald stabbed the man four to five times. Finally, Reginald stated that Jerry hit the woman on the head with a baseball bat as she lay on the kitchen floor. Jerry claimed that Reginald delivered the final blows with a revolver.

These discrepancies are not only significant but are the same kind of "buck-passing posturing" the Lee dissenters identified as the earmark of a truly unreliable confession. (*Lee, 476 U.S. at 548, 90 L. Ed. 2d at 531, 106 S. Ct. at 2066* (Blackmun, J., joined [***32] by Burger, C.J., Powell and Rehnquist, JJ., dissenting).) We therefore find that under either the majority or the dissenting views expressed in Lee, Jerry's confession would be inadmissible as substantive evidence against Reginald. The fact that the jury was instructed not to consider Jerry's statement against Reginald or that Reginald's own confession was admitted against him does not cure this defect. *Cruz v. New York (1987), 481 U.S. 186, 193-94, 95 L. Ed. 2d 162, 172, 107 S. Ct. 1714, 1719.*

We also disagree with the State's argument that the error was harmless and did not affect the verdict. Jerry's statement implicated himself as well as Reginald in the crimes. Reginald's statement was similarly inculpatory, and mirrored Jerry's statement in many of

its details. Both defendants attempted to demonstrate at trial that the inculpatory statements they made were coerced and involuntary. Because Reginald chose to testify, Jerry was able to cross-examine him regarding the part that coercion may have played in obtaining his confession. However, because Jerry did not testify, Reginald could not cross-examine him as to whether his [***33] confession was coerced or involuntary. Therefore, Reginald's claim of coercion [*412] was undercut by his inability to confront Jerry regarding the accusations contained in his statement. Given this set of facts, Reginald's convictions must be reversed and the cause remanded for a new trial.

We now address the remaining issues raised by Jerry. The first issue he raises is whether the trial court's finding that he failed to establish a prima facie case of racial discrimination under Batson was erroneous.

As previously stated, the United States Supreme Court has held that the equal protection clause forbids a prosecutor from peremptorily challenging potential jurors solely on account of race or on the assumption that black jurors as a group will be unable to impartially consider the prosecutor's case against a black defendant. (*Batson v. Kentucky (1986), 476 U.S. 79, 89, 90 L. Ed. 2d 69, 83, 106 S. Ct. 1712, 1719.*) Batson requires that a defendant first establish a prima facie case of discrimination. *(476 U.S. at 93-94, 90 L. Ed. 2d at 85-86, 106 S. Ct. at 1721.)* Once the defendant [***34] establishes a prima facie case, the burden shifts to the prosecution to come forward with race-neutral reasons for striking the black veniremen. *476 U.S. at 97, 90 L. Ed. 2d at 88, 106 S. Ct. at 1723.*

To establish a prima facie case, a defendant must first show that the prosecutor exercised his peremptory challenges to remove members of a cognizable racial group from the venire and that defendant is a member of that group. (*Batson, 476 U.S. at 96, 90 L. Ed. 2d at 87, 106 S. Ct. at 1723.*) The defendant may then "rely on the fact * * * that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate,'" in demonstrating "that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race." [**1184] *Batson, 476 U.S. at 96, 90 L. Ed. 2d at 87-88, 106 S. Ct. at 1723,* quoting *Avery v. Georgia [*413] (1953), 345 U.S. 559, 562, 97 L. Ed. 1244, 1247-48, 73 S. Ct. 891, 892.*

[***35] Jerry has met the first element of the Batson test for establishing a prima facie case of discrimination. Jerry is black and the State exercised peremptory challenges to remove from the venire certain members of his race. Therefore, the only question which remains is whether, considering "all relevant circumstances," he has established a prima facie case of discrimination. A trial court's determination that a defendant has failed to establish a prima facie case of discrimination will not be overturned unless it is against the manifest weight of the evidence. *People v. Evans (1988), 125 Ill. 2d 50, 71.*

The relevant circumstances a trial court may consider when determining whether a prima facie case of discrimination has been established include: a "'pattern' of strikes against black" veniremen; "the prosecutor's questions and statements during voir dire examination

and in exercising his challenges" (*Batson, 476 U.S. at 97, 90 L. Ed. 2d at 88, 106 S. Ct. at 1723*); the disproportionate use of peremptory challenges against blacks; whether the excluded blacks were a heterogeneous group sharing race [***36] as their only common characteristic; the level of black representation in the venire as compared to the jury; the race of the defendant and the victim; and the race of the witnesses (*Evans, 125 Ill. 2d at 63-64*). However, "the court must avoid arbitrarily deciding this delicate question solely from the number of blacks peremptorily challenged." *Evans, 125 Ill. 2d at 64,* citing *People v. Hooper (1987), 118 Ill. 2d 244, 247-49* (Ryan, J., specially concurring).

Considering the circumstances in light of the actual facts of this case, we conclude that the trial court's finding that Jerry failed to establish a prima facie case of discrimination was not against the manifest weight of the evidence. Jerry does not contend that the State exercised a pattern of strikes against the black veniremen, nor does he contend that the excluded veniremen are as [*414] heterogeneous as the community as a whole, sharing race as their only common characteristic. Indeed, as the trial court's thoughtful analysis demonstrates, the excluded veniremen shared many characteristics with their fellow veniremen.

Jerry's main assertion is that because [***37] the State excluded all seven black veniremen who remained after challenges for cause, and the court asked the State to offer explanations for those seven challenges, he has established a prima facie case. This argument assumes too much. Mere numbers do not establish a prima facie case of discrimination. (*Hooper, 118 Ill. 2d at 247-49* (Ryan, J., specially concurring).) Further-

more, the fact that the trial court, relying on pre-Batson case law, invited the State to come forward with reasons for the questioned challenges does not establish a prima facie case. The court's comments merely demonstrate that it was under the same misapprehension as defendant; that a prima facie case of discrimination is demonstrated through mere numbers.

Jerry argues that the trial court's reliance on "apparent explanations" for the State's challenges demonstrates that the trial court "confused the [defendant's] duty to present a prima facie case * * * and the prosecutor's duty to explain the challenges once a prima facie case is established." The record reveals, however, that rather than relying on "apparent explanations" for the State's challenges, the [***38] trial court merely reviewed the characteristics of the stricken jurors to determine their heterogeneity. This is a relevant circumstance which a trial court may consider when determining a prima facie case of discrimination. *Evans, 125 Ill. 2d at 63-64.*

Jerry also makes several related arguments which challenge the trial judge's consideration of his previous experience with Assistant State's Attorney Tsukuno. Jerry argues that the trial judge's consideration [**1185] of Mr. Tsukuno's prior conduct in other cases "ignores settled law that a defendant may establish a case of racial discrimination [*415] solely on the record of his own trial, without regard to a prosecutor's conduct in other cases"; the fact that Mr. Tsukuno is of Japanese-American heritage does not defeat the existence of a prima facie case; the trial court improperly discounted "the element of the prima facie case that peremptory challenges constitute a jury selection prac-

tice that permits those to discriminate who are of a mind to discriminate"; and the trial court's "praise of the prosecutor" is irrelevant since Mr. Tsukuno's trial partner stated for the record the names of the jurors [***39] against whom the State exercised its peremptory challenges.

Jerry's arguments ignore the fact that trial judges "are familiar with local conditions and prosecutors, and can draw upon their power of observation and judicial experience as a guide in distinguishing a true case of discrimination from a false one." (*Evans, 125 Ill. 2d at 67,* citing *People v. Wheeler (1978), 22 Cal. 3d 258, 281, 583 P.2d 748, 764, 148 Cal. Rptr. 890, 905.*) By asserting that Mr. Malatesta stated for the record the names of the jurors whom the State peremptorily challenged, Jerry seems to suggest that Mr. Tsukuno played no part in voir dire. This assertion is not borne out by the record, which demonstrates that Mr. Tsukuno participated not only in voir dire, but in all proceedings from indictment through post-trial motions. The record shows that the trial judge used his experience, as well as his superior knowledge of local conditions and prosecutors, in determining that the State's peremptory challenges were not motivated by impermissible racial-group bias. We see no reason to disturb this finding.

Jerry next contends that the trial [***40] court erred in excusing a venireman for cause without further inquiry into her feelings regarding the imposition of the death penalty. During the trial court's voir dire of venireman Patricia Botta, the following colloquy occurred:

> [*416] "[THE COURT]: Do you have any conscientious, religious, or moral scruples against the imposition of the death penalty?

[VENIREMAN BOTTA]: I really would not be for it, sir.

Q. Are you saying, in effect, then that under no circumstances would you sign your name to a death penalty verdict?

A. I really don't believe I could.

Q. Okay. I would be giving instructions concerning the criteria or standards that a jury is to follow or consider in coming to a conclusion as to whether a case is appropriate for the death penalty or inappropriate for the death penalty. Would you be able to follow those instructions in arriving at a verdict unanimously with eleven other jurors?

A. I don't know really how to answer that, you know, because my feelings are definitely—I don't think I could really live with the situation."

Jerry contends that venireman Botta's responses were ambiguous, and that it was improper for the trial court to excuse her [***41] for cause without further inquiry into her feelings regarding the death penalty.

A venireman who expresses only general objections to the death penalty may not be excused for cause. (*Witherspoon v. Illinois (1968), 391 U.S. 510, 522, 20 L. Ed. 2d 776, 784-85, 88 S. Ct. 1770, 1777.*) The venireman's views regarding the death penalty will warrant exclusion for cause only where they will "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt (1985), 469 U.S. 412, 420, 83 L. Ed. 2d 841, 849, 105 S. Ct. 844, 850,* quoting *Adams v. Texas (1980), 448 U.S. 38, 45, 65 L. Ed. 2d 581, 589, 100 S. Ct. 2521, 2526.*

Venireman Botta's response to the trial court's question is almost identical to the responses discussed in *People v. Del Vecchio (1985), 105 Ill. 2d 414, 431,* and *People v. Gacho (1988), 122 Ill. 2d 221, 238-40.* In Del Vecchio, the venireman stated, "'I don't think I have the right to [*417] [impose the death penalty].'" [***42] [**1186] (*Del Vecchio, 105 Ill. 2d at 431.*) This court held that the words "I think" did not render the venireman's response vague or ambiguous. (*Del Vecchio, 105 Ill. 2d at 431.*) The venireman in Gacho responded, "'No, I would rather not,'" when asked if she could consider imposing the death penalty under any circumstance. (*Gacho, 122 Ill. 2d at 240.*) Again, this court found that the trial court's questions in Gacho demonstrated that the venireman's views concerning the death penalty would prevent or substantially impair the performance of her duties as a juror. *Gacho, 122 Ill. 2d at 240.*

In this case venireman Botta was asked questions about her feelings regarding the death penalty. To each of these questions she gave the following responses, respectively: "I really would not be for it"; "I really don't believe I could"; and, "I don't know how to answer that, you know, because my feelings are definitely—I don't think I could really live with the situation." The record demonstrates that the trial court varied the form of the question in an attempt to elicit a different response; however, the venireman [***43] remained unwavering in her views. Given the trial court's superior position to determine what venireman Botta intended to convey with her responses, we cannot say on this record that the trial court erred in excusing her.

Jerry contends next that the trial court erred in admitting Richard Pueschel's in-court identification of him as one of the two "men that were in [the Pueschel residence] on August 29, 1983." Jerry asserts that everything he received from the State during discovery indicated that no one would be able to identify him as one of the perpetrators of the crimes. He further asserts that Richard Pueschel admitted that he had a 15- to 20-minute conversation with Assistant State's Attorney Malatesta a month prior to trial, and that Assistant State's Attorney Malatesta admitted that during that interview Richard had told him he was "99 per cent sure" he could [*418] identify Reginald and Jerry as the perpetrators. Jerry concludes that the State was required to disclose Richard's oral statement that he could identify him, and that the trial court erred in failing to either strike the testimony or declare a mistrial.

Supreme Court Rule 412(a)(i) provides in pertinent part:

> [***44] "412. Disclosure to Accused
>
> (a) * * * the State shall, upon written motion of defense counsel, disclose to defense counsel the following material and information within its possession or control:
>
> > (i) the names and last known addresses of persons whom the State intends to call as witnesses, together with their relevant written or recorded statements, memoranda containing substantially verbatim reports of their oral statements, and a list of memoranda reporting or summarizing their oral statements." 107 Ill. 2d R. 412(a)(i).

It is clear that the State is required to disclose a witness' oral statements only if they are in "memoranda

containing substantially verbatim reports of their oral statements." Both parties agree that Richard's statement was never memorialized. It would appear from the foregoing that the State was not required to disclose the statement. Nevertheless, Jerry argues that there is an exception to this rule where the State's failure to reduce the statement to "written form amounts to an intentional tactic to prevent disclosure of relevant material to the defendant." (*People v. Szabo (1983), 94 Ill. 2d 327, 348,* citing *People v. DeStefano (1975), 30 Ill. App. 3d 935,* [***45] and *People v. Manley (1974), 19 Ill. App. 3d 365.*) A review of the cases to which Jerry cites in support of his assertion demonstrates that they are inapposite.

In Szabo, this court vacated defendant's convictions and remanded the case for further proceedings where it was shown that the State had deliberately destroyed "rough notes" made while conducting 20 witness interviews, totalling approximately [**1187] 30 hours. (*Szabo, 94 Ill. 2d at 343, 350.*) In DeStefano, the appellate court reversed defendant's murder conviction where a prosecutor [*419] admitted that he had ordered agents of the Illinois Bureau of Investigation to refrain from taking any written statements from defendant's alleged accomplice who had been granted immunity from prosecution. (*DeStefano, 30 Ill. App. 3d at 943.*) Finally, in Manley the appellate court upheld a trial court's ruling holding a prosecutor in contempt of court where he admitted that it was the practice of his office to refrain from reducing a witness' oral statements to writing in order to surprise the defendant at trial. *Manley, 19 Ill. App. 3d at 369, 372.*

[***46] In contrast to the cases cited above, there is no evidence in this case to demonstrate that the State acted in bad faith. Jerry asserts that bad faith is demonstrated by the State's failure to "correct erroneous information" contained in documents produced during discovery. However, he fails to point to even one document which contained this allegedly "erroneous information." We will not presume lightly bad faith on the part of the State, and the sole fact that Jerry was "surprised" by Richard's in-court identification of him as one of the perpetrators of the crimes cannot be grounds for such a finding.

Jerry next asserts that a statement Jo Ellen Pueschel's mother made from the gallery during the redirect examination of Reginald denied him a fair trial. During defense counsel's redirect examination of Reginald Mahaffey, the following colloquy took place:

"Q. Did you kill the Pueschels?

A. No, sir.

MRS. JOSEPHINE HEINRICH (From the audience): Did you kill my daughter? I'm sorry.

THE COURT: Ma'am please.

MRS. JOSEPHINE HEINRICH (From the audience): —my grandson

THE COURT: Ma'am, please, Mrs. Heinrich. Continue, Mr. Levin.

MR. LEVIN [counsel for defendant Reginald Mahaffey]: [***47] I want a recess now, please.

[*420] THE COURT: There is no need for it, there is no need for it.

MR. LEVIN: I have a motion then, your Honor.

MR. DECKER [counsel for defendant Jerry Mahaffey]: We also wish to join in on behalf of Jerry Mahaffey.

THE COURT: We will take your motion up after the recess. Continue your questions.

MR. LEVIN: I have no further questions.

MR. MALATESTA: We have no further questions.

MR. DECKER: Judge, if I may briefly."

After Mr. Decker finished cross-examining Reginald, all counsel and the court recessed into chambers where counsel for both defendants made a motion for a mistrial. After hearing argument of counsel, and having the court reporter read back the record of Mrs. Heinrich's statement, the trial court denied the motion, stating:

"I heard the unfortunate occurrence and I was present. As soon as Mrs. Heinrich got up and began to yell, because that is what she did, the statement that the court reporter just read I immediately said, 'Ma'am, stop' or whatever I said. Her husband and two sons immediately jumped up and smothered her in their arms. She broke away from them and said something else, whatever it was I did not catch, but it was [***48] some type of remark. She was red in the face and obviously emotional at the time, then they led her away.

Now, it is an unfortunate circumstance in a case that has been relatively free of courtroom hystrionics. However, with all of the admonitions that I have made to the jury in the past and the admonitions that I intend to give to the jury in connection with this particular statement and knowing the quality of the jurors that were selected in this case,

I believe that they can truly put aside from their deliberations the emotional statement [**1188] that was made by Mrs. Heinrich and can consider this case based on the evidence they heard from the witness stand.

I will admonish them now and I will admonish them again at the conclusion with the regular instructions. However, I do not feel that it is of such moment that it would prejudice the defendants to such an extent that it would prevent them from getting a fair and impartial trial.

[*421] Your motions for mistrial are denied."

Court then reconvened and the trial court admonished the jurors in the following manner:

"If you remember when we were first selecting you as jurors I asked you questions concerning whether or not you [***49] would be able to judge this case based solely and exclusively on the testimony you heard from this witness stand, the arguments of the lawyers and my instructions to you, and you each said that in your own way that you'd be able to do that. And you each were able to say that you would not allow sympathy or prejudice to influence your verdict but would again concentrate your deliberative efforts solely and exclusively on what you heard in this courtroom from that witness stand.

We had an incident today, you were all present here. I would ask you and instruct you now orally and we will further instruct you later on, that you do not in any way consider the incident that took place in any way in coming to your conclusions as to the guilt or innocence of either Reginald Mahaffey or Jerry Mahaffey. As best you possibly can, put that from your mind when you are deliberating

> on this. You said you'd be able to do that before, I have confidence that you will be able to do it. But I am again stressing that this is one of the things that you said you would be able to do and when you put your hand up and took the oath that is one of the obligations that you imposed upon yourselves, and I [***50] am sure you will be able to do that."

We find instructive this court's decision in *People v. Herbert (1935), 361 Ill. 64.* In Herbert, the defendant testified at trial, and was asked whether he had murdered the victim. When the defendant denied his involvement in the crime, the victim's widow shouted, "You dirty, lying thing, you! How dare you sit there and say that! You dirty liar!" This court found that the remarks did not deny defendant a fair trial, although it stated that the trial court should have admonished the jury to disregard the remarks. *Herbert, 361 Ill. at 71-72.*

[*422] Mrs. Heinrich's remarks in this case can in no way be considered as inflammatory as those at issue in Herbert. Mrs. Heinrich's remarks were not accusatory, but merely re-asked the question which Reginald had just answered. Furthermore, the trial court did not highlight the incident by immediately recessing court and allowing the jurors to dwell on the incident, but allowed re-cross-examination to continue. Finally, the trial court followed Herbert's dictates and thoroughly admonished the jurors to ignore the incident and rely solely on the [***51] evidence when deliberating.

Jerry asserts the trial court's instruction that the jurors should ignore the remarks "[a]s best you possibly can" is a weak admonition and left the jury with the impression that the instruction was permissive rather

than compulsive in nature. This argument substantially ignores the majority of the court's statement, which clearly instructed the jury that it was their duty "to judge this case based solely and exclusively on the testimony [they] heard from [the] witness stand." Based on the record before us, we cannot say Jerry was denied a fair trial.

Our conclusion that the trial court did not err in determining that the jury could properly perform its function at the guilt phase of the trial also compels us to disagree with Jerry's assertion that Mrs. Heinrich's comments entitled him to a new jury at the sentencing phase. Nevertheless, Jerry cites to a recent Supreme Court case which he contends requires us to remand the case for resentencing. (See *Turner v. Murray (1986), 476 U.S. 28, 90 L. Ed. 2d 27, 106 S. Ct. 1683.*) We disagree. [**1189] In Turner, the Supreme Court stated that "[b]ecause of the range of [***52] discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." (*Turner, 476 U.S. at 35, 90 L. Ed. 2d at 35, 106 S. Ct. at 1687.*) The Court went on to hold "that a capital defendant accused of an interracial crime is entitled to [*423] have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *(476 U.S. at 36-37, 90 L. Ed. 2d at 37, 106 S. Ct. at 1688.)* Turner involved the role that racial bias may have in influencing a sentencing jury. Jerry asks this court to extend the holding in Turner, and find that Mrs. Heinrich's comments may have influenced this jury in the same way that undetected racial bias may have influenced the sentencing jury in Turner. We see no reason to give Turner such an ex-

pansive reading. Having thoroughly reviewed the record concerning Mrs. Heinrich's comments and the trial court's admonitions to the jury to disregard those comments in their deliberations, we find Jerry's contention to be without merit.

Jerry's next argument revolves [***53] around the State's failure to have Cedric Mahaffey fingerprinted or to testify at trial. Jerry asserts that some of the prosecution's statements during trial and closing argument shifted the burden of proof to him to produce Cedric Mahaffey at trial, and undermined the presumption of his innocence. When the disputed comments are placed in context, however, it becomes apparent that any error was invited.

During its closing argument, the State never made reference to the failure of Jerry to call Cedric Mahaffey to testify. However, in his closing argument Jerry's counsel made several references to the fact that the State had failed to call Cedric Mahaffey as a witness:

> "For you see, the burden in this instance is upon these two prosecutors. That is their job. If you feel that they have failed to present a critical witness to you, who you would have wanted to hear and see, that would have helped you establish in your own minds, was there a reasonable doubt in this case or was there not? Then you see, that is their burden. That is their job, the job that they are paid to do, and the job that they accepted to do when they accepted their office. If you feel that they failed [***54] in that burden, well then by your oath, your own job, your decision must be that of not guilty.
>
> [*424] * * *
>
> * * * [U]nless you were convinced beyond a reasonable doubt, unless you were convinced that the

> State has met their burden in this case * * * [t]hat they would call those witnesses who had information about this case, that they would call that felon, Cedric Mahaffey."

It was only after Jerry's counsel raised the issue of Cedric Mahaffey's failure to testify that the prosecutor made the following comments during rebuttal closing arguments which Jerry now cites as error on appeal:

> "There is no greater power in this nation concerning a case before a court and that man that is sitting right up there. If I walked up to this man and I said, Your Honor, I want to subpoena this witness, and if they walked up to this man and they said, Your Honor, we want to subpoena this witness; it could be President Reagan himself, the President of the United States; and do you know what, ladies and gentlemen? He must appear. He must appear.
>
> Do not—do not believe, for one minute, that if they wanted to, they could not have brought Cedric Mahaffey into this courtroom. They did not [***55] want to.
>
> MR. DECKER [counsel for defendant Jerry Mahaffey]: Objection.
>
> MR. MALATESTA: And do you know why?
>
> THE COURT: Overruled.
>
> MR. LEVIN [counsel for defendant Reginald Mahaffey]: Objection.
>
> [MR. MALATESTA]: And if they wanted to bring in Cedric Mahaffey to contradict Sergeant Byrne, they could have done it in a second. They know exactly where he is.
>
> MR. DECKER: Objection, your Honor.

[**1190] MR. MALATESTA: They know exactly where he is.

MR. LEVIN: Objection.

THE COURT: Overruled. Overruled.

* * *

[MR. MALATESTA]: They are looking for one of you to be silly enough to believe his story, to be silly enough to not listen to what you heard on that stand, and believe his story about this mystery man that we didn't listen to for two weeks.

[*425] There's no mystery. You know exactly where he's at. They know exactly where he's at. They know exactly where he's at.

MR. DECKER: Objection once again, your Honor.

THE COURT: Overruled."

From the foregoing, it is apparent that at the very least, defense counsel was arguing that Cedric Mahaffey was privy to some exculpatory information. Pursuing this line of argument, defense counsel demanded that the State explain Cedric's failure to testify. [***56] In response to this challenge, the State reminded the jurors of the power of compulsory process, and argued that Jerry's innocence was not the only inference to be drawn from Cedric's failure to testify. Because the comments were invited, they cannot be relied upon as error on appeal. *People v. Collins (1985), 106 Ill. 2d 237, 284.*

Jerry also asserts as error the prosecutor's statement regarding the fact that Jerry also had the ability to procure Cedric Mahaffey's prints. During defense counsel's cross-examination of the State's fingerprint expert, the expert was asked whether the State's Attorney's office could obtain Cedric Mahaffey's palm print. The State

objected to the question, and stated that the defense also had the ability to obtain Cedric Mahaffey's finger and palm prints. Jerry contends that the comment had the effect of shifting the burden of proof to him to prove his innocence.

The record reveals that the trial court, at defense counsel's request, instructed the jury to disregard the comment. Moreover, the prosecutor did not dwell on the matter, and the record demonstrates the jury was properly instructed throughout the trial regarding the presumption [***57] of innocence and the State's burden of proof. On these facts, we cannot say that this isolated remark, nor any of the remarks Jerry cites as error, was a material factor in his convictions such that the outcome of the verdict would have been different. *Collins, 106 Ill. 2d at 276.*

[*426] Jerry's next contention is that the State failed to prove the corpus delicti of the rape. We disagree. This court has held that:

> "[I]n establishing the corpus delicti, there must be some evidence, apart from the confession, demonstrating that a crime occurred. * * *
>
> * * *
>
> * * * [I]f the independent evidence tends to prove that an offense occurred, then such evidence, if corroborative of the facts contained in the confession, may be considered along with the confession in establishing the corpus delicti. In such event, the independent evidence need not establish beyond a reasonable doubt that an offense did occur." (Emphasis in original.) (*People v. Willingham (1982), 89 Ill. 2d 352, 360-61.*)

In this case, the evidence shows that Jo Ellen Pueschel was found dead, lying face down on the kitchen floor, clad only in a nightgown with [***58] no undergarments. Expert testimony also showed that her vagina was "widely patent" and that the vaginal swab taken from her tested positive for the presence of sperm. In his confession, Reginald stated that he led Mrs. Pueschel out of the bedroom in which he found her, and had vaginal intercourse with her in the living room and the kitchen. Jerry stated in his confession that Mrs. Pueschel was wearing a blue negligee. It is clear that the condition of Mrs. Pueschel's body when found and the physical evidence suggesting recent intercourse tend to prove that an offense occurred. Furthermore, these [**1191] facts, when coupled with both of the defendants' statements, establish the corpus delicti of rape.

Jerry cites to several cases in support of his argument that the State failed to prove the corpus delicti of the rape: *People v. Lambert (1984), 104 Ill. 2d 375; People v. Thomas (1960), 18 Ill. 2d 439; People v. Kokoraleis (1986), 149 Ill. App. 3d 1000; People v. Anderson (1974), 20 Ill. App. 3d 840.* All are inapposite. Two of the cases to which Jerry cites deal not with proving the corpus delicti [***59] of rape, but with evidence corroborating a rape [*427] complainant's testimony. (*Thomas, 18 Ill. 2d at 444; Anderson, 20 Ill. App. 3d at 849.*) In Kokoraleis there was no evidence to corroborate defendant's confession to the crime of rape because the victim's body and clothing were badly decomposed. (*Kokoraleis, 149 Ill. App. 3d at 1027-28.*) In contrast to the lack of physical evidence in Kokoraleis, the evidence in this case demonstrates that the victim was found

lying face down in the kitchen clad only in a nightgown, and that her vagina was widely patent. Moreover, the vaginal swab taken from her tested positive for the presence of sperm. Finally, the only evidence in Lambert outside of the defendant's confession tending to show that defendant had committed the crime of indecent liberties with a child was that the defendant slept in the basement while living with the victim's family, and that the victim's rectum was "pinkish and swollen" two to three weeks after he had slept in the basement defendant used as a bedroom. (*Lambert, 104 Ill. 2d at 379-80.*) In contrast to the break in [***60] the evidentiary chain occasioned by the two to three week delay in Lambert, the evidence of rape in this case was discovered within a few hours after the crime occurred. We therefore conclude that the State has established the corpus delicti of the rape.

In a related contention, Jerry asserts that the case must be remanded for resentencing. He contends that because the State failed to prove the corpus delicti of the rape, a factor in aggravation has been shown not to exist. Given our conclusion that the State did prove the corpus delicti of the rape, this contention must be deemed to be without merit.

Jerry next contends that the prosecutor's statements during rebuttal argument at the death phase denied him a fair sentencing hearing. The record reveals however that the statements were merely a proper response to statements defense counsel made in closing argument.

During closing argument at the death phase, Jerry's counsel told the jury to not allow the prosecutors to

[*428] force them to "become an instrument of violence," and argued that there was "no easy way to determine how to kill someone and when we [should kill someone.]" Counsel added, "I am certainly [***61] glad of one thing[,] I am glad that is your job and not mine." Counsel continued this line of argument, stating that additional violence in the form of a death sentence for Jerry would not bring the victims back to life, and that they should not err "on the side of violence," but "on the side of mercy."

In response to these remarks, the State argued:

> "You are not the instrument of violence, you are a group of people from all sections of our community. You are a group of people who came together a little less than a month ago and had the opportunity to participate firsthand in what I believe to be the most important part of our lives. And that is the insurance that justice; not a word[,] a reality, that justice is part of our criminal justice system, that it is real.
>
> In your actions, in what we are asking you to do, and that is to follow the law, in your following of that law, in that law that must be meaningful, you are not killing anyone, you are not creating a violent society, you are carrying out the law and making it meaningful. You are telling the real people that are violent in our society that we cannot tolerate it any longer, we will not tolerate it any longer.
>
> [**1192] All of [***62] this time, all of the sacrifice that each and every one of you has given to us cannot stop now, it can't. In order for that law to be meaningful you must have the courage to carry it out and courage it takes. There is no mistake about

what it takes to insure that there is order in our society.

* * *

You, by your decision in following the law, are not putting anyone to death. You are carrying out the will of the people and you are following the law that is necessary for our time. We have tried what Mr. Decker asked of you, to get to the cause. We have tried to rehabilitate, we have tried it in this case on these two men and it just doesn't work. Not only did it not work for them but it [*429] shows and creates and allows a total disregard and disrespect for the laws that govern us.

* * *

Do not feel guilty for being courageous enough to participate in the criminal justice system. Do not feel guilty that collectively you have come together to insure justice.

You as an individual (indicating), and you as an individual (indicating), are not killing Jerry and Reginald Mahaffey as they suggested. You, as a jury, as a representation of our community, are carrying out the law."

[***63] It is clear that when the prosecutor's comments are read in context, he was merely denying that the jurors were instruments of violence, and focusing on their duty to follow and enforce the law. The prosecutor's comments did not seek "to minimize the jury's sense of responsibility for determining the appropriateness of death." (*Caldwell v. Mississippi (1985), 472 U.S. 320, 341, 86 L. Ed. 2d 231, 247, 105 S. Ct. 2633, 2646.*) Quite the contrary, a complete review of the record indicates that the arguments of both parties insured that the "jury recognize[d] the gravity of its task and

proceed[ed] with the appropriate awareness of its 'truly awesome responsibility.'" *Caldwell, 472 U.S. at 341, 86 L. Ed. 2d at 247, 105 S. Ct. at 2646.*

Jerry also contends that the prosecutor erred in stating that "[w]hen they tell you that they will spend the rest of their lives in prison, there's no guarantee." The evidence introduced at the sentencing hearing showed that Jerry escaped from Cook County jail while awaiting trial. When asked at the sentencing hearing whether he would attempt to escape again, he replied, [***64] "I don't know." From the foregoing it can be seen that the prosecutor's comments were not improper, as they were clearly based on evidence adduced at the sentencing hearing. See *People v. Johnson (1986), 114 Ill. 2d 170, 198.*

Jerry also asserts that the prosecutor erroneously "belittled" a recognized factor in mitigation, namely, that he "grew up in a bad area." The record reveals that defendant failed to object to this statement, and failed to [*430] include the purported error in his post-trial motion. The issue is therefore waived through procedural default. *People v. Gacho (1988), 122 Ill. 2d 221, 239; People v. Holman (1984), 103 Ill. 2d 133, 181-82* (Ryan, C.J., concurring in part and dissenting in part).

Jerry also contends that the prosecutor's statement that a sentence of life imprisonment would have the effect of "letting [the defendants] go," "created the unacceptable risk that the death penalty was imposed on the basis of some extraneous fear of rewarding the defendants." The record reveals however that the prosecutor was merely arguing that death was a reasonable form of punishment in this case. See *People v. Albanese (1984), 102 Ill. 2d 54, 81.*

[***65] Jerry next asserts that the trial court erred in refusing to instruct the jury that if it failed to sentence him to death, the court would sentence him to a term of natural life imprisonment. This court has recently held that:

> "An instruction in the case of multiple murders should state that if the jury finds mitigating factors sufficient to preclude imposition of the death penalty, the defendant will be sentenced to natural [**1193] life imprisonment, and no person serving a term of natural life imprisonment can be paroled or released, except through executive clemency." (*People v. Gacho (1988), 122 Ill. 2d 221, 262.*)

The new rule announced in Gacho was held to be prospective only (*Gacho, 122 Ill. 2d at 263*); therefore, the trial court properly instructed the jury in accordance with existing law (see *People v. Albanese (1984), 102 Ill. 2d 54, 81; People v. Stewart (1984), 105 Ill. 2d 22, 71*). Jerry argues that the Supreme Court's recent decision in *Griffith v. Kentucky (1987), 479 U.S. 314, 93 L. Ed. 2d 649, 107 S. Ct. 708,* which held that decisions announcing [***66] new constitutional rules of criminal procedure are "to be applied retroactively to all cases, state or federal, pending on direct review or not yet final," requires us to reexamine our holding in Gacho. This issue was recently decided adversely to Jerry in *People v. Harris (1988), [*431] 123 Ill. 2d 113,* where we declined to reconsider our holding regarding the retroactivity of new rules announced before the Supreme Court's decision in Griffith. *Harris, 123 Ill. 2d at 130.*

Jerry next contends that the trial court erred in holding a joint death penalty hearing. Without citation

to any part of the record or any supporting authority, Jerry asserts "that jurors find it impossible to rationally differentiate imposing the death sentence on one defendant while sparing the second defendant and, so will inflict it on both of them."

Jerry failed to include this issue in his post-trial motion, thereby waiving the issue through procedural default. (*People v. Gacho (1988), 122 Ill. 2d 221, 239; People v. Holman (1984), 103 Ill. 2d 133, 181-82* (Ryan, C.J., concurring in part and dissenting in part).) [***67] Moreover, his failure to cite to any authority or to any section of the record in support of his argument also results in waiver of the issue pursuant to Supreme Court Rule 341 (107 Ill. 2d R. 341). Given these deficiencies, we must deem the issue to be without merit.

Jerry's next contention is that his death sentence is excessive given his light criminal background and "deep family support." We begin by noting that when reviewing a sentence of death, this court will make a separate review of the record but will not overturn a trial court's finding when that finding is amply supported by the evidence. *People v. Brownell (1980), 79 Ill. 2d 508, 539-40.*

The evidence adduced at the sentencing hearing reveals that Jerry has a record of criminal conduct dating back to 1979. He has three convictions for robbery, two for retail theft and one for theft. We find significant the fact that his criminal conduct continued even after his arrest for these crimes, as evidenced by the fact that he robbed a prison guard and escaped from prison while awaiting trial. When Jerry's criminal background, and his conduct while in prison, is coupled with the crimes

of which he has presently [***68] been convicted, we find no reason [*432] to overturn the jury's finding that there are no mitigating factors present to preclude imposition of the death penalty.

Jerry next raises several claims challenging the constitutionality of the Illinois death penalty statute, all of which have been resolved against him. The statutory grant of discretion to the prosecutor of whether to seek the death penalty in a particular case is valid and constitutional. (*People v. Evans (1988), 125 Ill. 2d 50, 98; People ex rel. Carey v. Cousins (1979), 77 Ill. 2d 531, 534-43.*) The State does not have to prove the absence of mitigating factors beyond a reasonable doubt. (*People v. Johnson (1987), 119 Ill. 2d 119, 151; People v. Kubat (1983), 94 Ill. 2d 437, 504.*) The death penalty statute does not place an impermissible burden of proof upon the defendant to establish mitigating factors. (*People v. Orange (1988), 121 Ill. 2d 364, 390.*) [**1194] Moreover, the death penalty statute does not deprive the defendant of adequate appellate review. (*People v. King (1986), 109 Ill. 2d 514, 551; People v. Gaines (1981), 88 Ill. 2d 342, 383-84.*) [***69] We have also determined that sympathy should not be considered as a mitigating factor (*People v. Crews (1988), 122 Ill. 2d 266, 291-93*), and we have found no merit to the statistical argument that killers of whites are more likely to receive the death sentence than are killers of blacks (*People v. Davis (1987), 119 Ill. 2d 61, 64-66; People v. Spreitzer (1988), 123 Ill. 2d 1, 45-46*).

For the reasons set forth above, we reverse defendant Reginald Mahaffey's convictions and remand the case for a new trial. We affirm defendant Jerry Mahaffey's convictions and his sentence of death. We hereby direct

the clerk to enter an order fixing the date of Tuesday, September 12, 1989, as the date on which the sentence of death entered by the circuit court of Cook County shall be carried out. Defendant Jerry Mahaffey shall be executed by lethal injection in the manner provided by section 119–5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1987, ch. 38, par. 119–5). A [*433] certified copy of this mandate shall be transmitted by the clerk of this court to the Director of Corrections, the warden of Stateville Correctional [***70] Center, and to the warden of the institution where defendant Jerry Mahaffey is confined.

No. 61821 – Affirmed.

No. 61822 – Reversed and remanded.

CONCUR BY: MILLER (In Part)

DISSENT BY: MILLER (In Part)

DISSENT: JUSTICE MILLER, concurring in part and dissenting in part:

I join that part of the court's opinion with respect to cause No. 61821, which affirms the convictions and death sentence of defendant Jerry Mahaffey. I do not agree with the court, however, that a new trial is required in cause No. 61822, involving defendant Reginald Mahaffey, and therefore I dissent from that portion of the majority opinion.

The defendants were tried jointly before a jury on charges stemming from the murder of Dean and Jo Ellen Pueschel, the sexual assault of Mrs. Pueschel,

and the attempted murder of the Pueschels' 11-year-old son, Richard. At trial the State presented the identification testimony of Richard Pueschel as well as evidence establishing that certain items of property belonging to the Pueschels were discovered in the defendants' possession when they were arrested in connection with the offenses here. The State also presented, as part of its case in chief against each defendant, that defendant's confession [***71] to the crimes; the jurors were instructed, both when the confessions were published and later, at the outset of deliberations, not to rely on the confession of one defendant in determining the guilt or innocence of the other. At trial the defendants challenged the accuracy of their confessions. Reginald Mahaffey testified, and he denied any involvement in the offenses and claimed that his confession was the product of coercion. Jerry Mahaffey, who did not testify, presented a similar defense through the testimony of other witnesses, disputing the strength [*434] of the State's evidence and attempting to show that his own confession was also coerced.

Before trial the defendants had moved for a severance on the grounds that the State's intended use of the confessions would, under *Bruton v. United States (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620,* deny them their right to confront witnesses. The trial judge denied the motion, relying on the plurality opinion in *Parker v. Randolph (1979), 442 U.S. 62, 60 L. Ed. 2d 713, 99 S. Ct. 2132,* which held that Bruton error does not occur [***72] if a defendant's own confession, introduced into evidence, "interlocks" with, or is corroborated by, the confession of the nontestifying codefendant and the jury receives instructions correctly limiting the use of the evidence.

The Supreme Court has since rejected Parker, however, in *Cruz v. New York [**1195] (1987), 481 U.S. 186, 95 L. Ed. 2d 162, 107 S. Ct. 1714.* Because Jerry Mahaffey did not testify at trial, codefendant Reginald Mahaffey claims that, under Bruton and Cruz, he was denied his confrontation right by the introduction of Jerry's incriminating confession. The State now contends that there were sufficient indicia of reliability to have warranted substantive evidentiary use of Jerry Mahaffey's confession against Reginald Mahaffey and, alternatively, that the Bruton error was harmless. For the reasons set out below, I would conclude that what error occurred was indeed harmless and does not necessitate a new trial.

Bruton errors, though constitutional in nature, do not mechanically compel reversal (see *Cruz, 481 U.S. at 193-94, 95 L. Ed. 2d at 172, 107 S. Ct. at 1719*), [***73] and a conviction may be upheld if the reviewing court is able to determine that the constitutional violation was harmless beyond a reasonable doubt (see *Chapman v. California (1967), 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824*). This requires consideration of the strength of the competent evidence of the defendant's guilt and the probable effect on the jury of the nontestifying codefendant's confession. [*435] See *Brown v. United States (1973), 411 U.S. 223, 36 L. Ed. 2d 208, 93 S. Ct. 1565; Schneble v. Florida (1972), 405 U.S. 427, 31 L. Ed. 2d 340, 92 S. Ct. 1056; Harrington v. California (1969), 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726.*

The State presented substantial evidence establishing Reginald Mahaffey's guilt of the offenses charged here. At trial Richard Pueschel, who survived the brutal attack, identified the defendants as the family's assail-

ants. The State also presented Reginald Mahaffey's confession to the crimes. In his statement, Reginald Mahaffey described the brothers' entry into [***74] the Pueschels' apartment, the attempt to strangle the Pueschels' son, Richard, the murder of Mr. Pueschel, the sexual assault and murder of Mrs. Pueschel, the removal of a number of possessions from the apartment, and the brothers' escape in the victims' car. Reginald Mahaffey's account of the offenses was confirmed by investigating officers, whose analysis of the crime scene verified the details given in the confession.

Numerous items identified at trial as belonging to the victims were found in Reginald Mahaffey's possession at the time of his arrest, four days after the offenses occurred. In Reginald Mahaffey's room police officers discovered Mr. Pueschel's .357 Magnum revolver and Remington shotgun; the handgun bore traces of blood consistent with Mrs. Pueschel's blood type. The officers also found a stereo dust cover containing 24 pieces of jewelry belonging to the Pueschels, including several bracelets bearing the victims' names. Reginald Mahaffey was wearing Mr. Pueschel's ring, and he had in his pocket Mr. Pueschel's watch and crucifix. At trial Reginald testified that he had purchased the guns and other items from another man; there was no evidence to corroborate that [***75] explanation. Police officers found the Pueschels' television set, video cassette recorder, and videotapes in Jerry Mahaffey's own apartment.

[*436] In view of the substantial evidence of Reginald Mahaffey's guilt, I do not believe that it can be said that he was prejudiced by the State's use at the joint trial of his brother's confession, which, like his own, implicated both defendants. In this regard, it may be

noted that the Mahaffeys' defenses to the charges were complementary rather than antagonistic. Their shared theory of defense claimed that they did not take part in the attack on the Pueschels and that their confessions to those crimes were involuntary. If Jerry Mahaffey had taken the witness stand at trial, he would have denied involvement in the offenses and would have asserted that his inculpatory statements to the police were coerced. But other testimony on those claims was introduced into evidence on Jerry Mahaffey's behalf. In essence, Jerry's failure to testify cost Reginald Mahaffey only the opportunity to present further testimony in support of the defense contentions.

Assuming that a Bruton error occurred in this case, I would hold that the violation [***76] was harmless beyond a reasonable doubt, and I would therefore consider in the [**1196] present appeal the remaining arguments raised by defendant Reginald Mahaffey in cause No. 61822.

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Docket No. 98-1466

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS PAGE, Warden,

Petitioner,

-vs-

JERRY MAHAFFEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

ALAN M. FREEDMAN (Counsel of Record)
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9 pp

RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

Respondent, Jerry Mahaffey, moves this Court pursuant to Supreme Court Rule 39 for leave to proceed *in forma pauperis*. In support of this motion, Respondent states as follows:

1. Respondent is an indigent inmate, incarcerated in Illinois state prison.

2. Respondent was granted leave to proceed *in forma pauperis* in both the District and the Circuit Courts in the proceedings below.

3. Both the District and Circuit Courts below appointed the undersigned counsel to represent Respondent in these federal habeas proceedings pursuant to 21 U.S.C. § 848(q).

Wherefore, Respondent, Jerry Mahaffey, respectfully requests that he be granted leave to proceed *in forma pauperis*.

Respectfully submitted,

Alan Freedman

Counsel for Respondent

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Docket No. 98-1466

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

THOMAS PAGE, Warden,

Petitioner,

-vs-

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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SUMMARY OF ARGUMENT

Certiorari is inappropriate because each of the three questions presented by Petitioner are irrelevant to this case. Specifically, Petitioner's first question presented--pertaining to the standard of review to apply in reviewing a trial court's conclusion that there has been no prima facie case of discrimination under *Batson v. Kentucky*, 476 U.S. 79 (1986)--is irrelevant because the Seventh Circuit expressly concluded that it would have reached the same decision under any standard of review in that the state trial court's conclusion that there was no prima facie case of discrimination was clearly erroneous; and Petitioner's second and third questions presented are irrelevant because they are nothing more than hypothetical, academic questions that have absolutely no bearing on this case.

ARGUMENT

I. Certiorari is inappropriate because the standard of review question raised by Petitioner is irrelevant in that the Seventh Circuit explicitly found that its decision would have been the same under any standard of review.

Petitioner argues that this Court should grant certiorari to decide "the standard of review an appellate court should apply when reviewing a trial court's finding [of no] prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986)." (Cert. Pet. at i).[1] However, given the prosecutors' egregious conduct in utilizing peremptory challenges in this racially sensitive case to exclude all seven African-Americans from the venire, the standard of review question is ultimately irrelevant because the Seventh Circuit found that a prima facie case existed under any

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[1] It is worth noting that, notwithstanding Petitioner's first question presented, this case actually does not involve appellate review of a trial court's findings. Instead, this case involves habeas proceedings challenging Respondent's convictions and sentence of death. Respondent also notes that the standards for adjudication set forth at 28 U.S.C. Sec. 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), do not apply here because these habeas proceedings were pending on April 24, 1996, the effective date of the AEDPA.

standard of review. (App. A9).[2] As the Seventh Circuit explained,

> We recognize, of course, that Batson requires us to look to all the relevant facts and circumstances in assessing whether an inference of discrimination should arise. . . . Yet by far the most important factor in this case, and one that the Illinois courts were too quick to overlook, is that all seven African-American members of the jury venire were excused by the State, meaning that not a single member of Mahaffey's own race was seated on the jury that decided his fate. This is therefore not a case in which only one or two members of a particular racial group were excused while other members of the same racial group remained; it is instead a case where the State exercised seven of thirteen total challenges to exclude every member of Mahaffey's own race. . . . The Supreme Court in Batson emphasized that an inference of discrimination may arise where the prosecutor makes a pattern of strikes against African-American jurors. 476 U.S. at 97. Such a pattern is plainly evident in the State's juror challenges here, where the prosecutor excused each and every African-American member of the jury venire. . . .
>
> And lest we forget, the crimes at issue in this case were obviously racially-sensitive--Mahaffey, a young African-American male from Chicago's South side, was charged with murdering a white couple on the North side, and with attempting to murder their young son. This is therefore a case in which the racial composition of the jury could potentially be a factor in how the jury might respond to Mahaffey's defense at trial, as well as to his arguments in mitigation at the capital sentencing phase.

(App. A9-11) Given the egregiousness of these circumstances, the Seventh Circuit found

> [u]ltimately, however, the standard of review question is largely beside the point, for even if a more deferential standard were applied, we would have to conclude that Judge Hett clearly erred in finding that no inference of discrimination arose from the facts and circumstances here.

(App. A9). Certiorari should not be granted to address what is, ultimately, an irrelevant issue.

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[2] Respondent will cite to the Seventh Circuit opinions in this case as they are included in Petitioner's Appendix to the Petition for a Writ of Certiorari. Thus, for example, "App. A9" refers to page 9 of Appendix A to Petitioner's Appendix to the Petition for a Writ of Certiorari.

PUBLISHER'S NOTE:

Page 3 is missing in original document.

III. Certiorari is inappropriate on Petitioner's third question presented--"Whether an appellate court may, if the record is sufficient, conduct the step-two and step-three inquiries under *Batson* if it determines that [the trial court erred in finding no prima facie case]?"--because that question also is irrelevant in that, as the Seventh Circuit found, the record here is inadequate to do so.

Petitioner has asked this Court to address "whether an appellate court may, *if the record is sufficient*, conduct the step-two and step-three inquiries under *Batson*?" (Cert pet. at i) (emphasis added). Regardless of whether an appellate court could, as a theoretical matter, conduct such inquiries with an adequate record, the record in this case is inadequate to do so. Specifically, as the Seventh Circuit explained in addressing this very question:

> The state trial court, state supreme court, district court, and the State itself in its brief, all maintain that the Batson hearing was limited to the prima facie determination. Although the State provided more detailed reasons for its challenges than is perhaps necessary at that stage, it has consistently asserted that it never provided the actual reasons for its challenges of each potential African-American juror. See, e.g., Brief of Attorney General at p.13 (arguing that only "apparent," not actual reasons were provided and declaring that "the prosecution never tendered `race-neutral' reasons at trial, nor during any appellate proceedings, state or federal."). Instead, the State limited its explanations to identification of "apparent" similarities on the record between excluded white venireperson and excluded African-Americans, arguing that those apparent similarities negated any inference of discrimination. Those apparent similarities, however, cannot be mistaken for the actual reasons for the challenges. Only after the defendant establishes a prima facie case is the State required to reveal its actual reasons for the exclusions. Moreover, at that stage, the relevant comparison is between the excluded African-Americans and the jurors that were allowed to sit on the jury. Because the trial judge never reviewed the actual reasons for the challenges and did not compare the excluded African-American venirepersons with those accepted on the jury, we are limited on appeal to determining whether the prima facie showing was met.
>
> We note that this conclusion would be mandated in any case because the trial court informed Mahaffey that he could respond to the raceneutral reasons after the prima facie determination was made. Although Mahaffey's counsel argued at some length that the challenges demonstrated discrimination, he also repeatedly noted that he would respond in more detail if the court determined that the prima facie showing was met. The court ultimately found to the contrary, of course, and thus Mahaffey never had the opportunity to address the State's rationale for excluding the African-Americans. *In those circumstances, it would be inappropriate for us to proceed on appeal to the*

ultimate issue of discrimination even with a more complete record.

(App. A5-8) (emphasis added).

In sum, Respondent has not come forward with what it claims were its "actual" (as opposed to "apparent") explanations for its peremptory challenges.[4] Moreover, even if the State's "apparent" explanations were in fact its "actual" explanations, Respondent has never had an opportunity to address those explanations. Because the record in this case is inadequate for any reviewing court to proceed to the step-two and step-three inquiries under *Batson*, certiorari is not appropriate in this case to decide whether a reviewing court could proceed to those inquiries in a theoretical case where there was in fact an adequate record to do so.

CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

Alan Freedman

One of the Attorneys for Respondent

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[4] It is not clear from the Petition for a Writ of Certiorari whether Petitioner is now asserting that its "apparent" explanations were in fact its "actual" explanations. Respondent submits that this Court should not even consider Petitioner's third question presented until Petitioner clarifies in a reply brief to this Court whether it is now taking the position that its "apparent" explanations were in fact its "actual" explanations. However, as explained by the Seventh Circuit and in the text, even if Petitioner is now taking that position, the record in this case is inadequate to proceed to the step-two and step-three inquiries because Respondent has never had a chance to address those explanations.

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April 8, 1999

Clerk of the Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: *Page v. Mahaffey*, No. 98-1466

Dear Clerk:

Please find enclosed for filing the original plus ten copies of Respondent's Motion for Leave to Proceed *In Forma Pauperis*, the original plus ten copies of the Brief in Opposition, and a certificate of service.

If there are any questions, please call me at (312) 726-1731.

Sincerely,

Alan Freedman

Alan M. Freedman
Counsel for Respondent, Jerry Mahaffey

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies that he caused copies of RESPONDENT'S MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and BRIEF FOR RESPONDENT to be served on the following counsel for Petitioner, Thomas Page, at the addresses so indicated by first class United States Mail, proper postage prepaid, on April 8, 1999.

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